86-482

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

PATCHOGUE NURSING CENTER,

Petitioner,

vs.

OTIS R. BOWEN, M.D., as Secretary of the United States Department of Health and Human Services, and DAVID AXELROD, as Commissioner of the New York State Department of Health,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Where a federal constitutional property right is implicated, can an informal, non-evidentiary pre-deprivation hearing satisfy procedural due process requirements in the absence of provision for a full and timely post-deprivation hearing?

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Petitioner Patchogue Nursing Center ("Patchogue") respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit, entered July 25, 1986, which affirmed an order of the United States District Court for the Eastern District of New York denying Patchogue's motion for a preliminary injunction barring

respondent Otis R. Bowen, M.D., as Secretary of the United States Department of Health and Human Services (the "Secretary" or "HHS") from imposing the intermediate sanction established by section 916 of the Omnibus Reconciliation Act of 1980, 42 U.S.C. §1395cc(f), banning Medicaid and Medicare reimbursement for new admissions into skilled nursing facilities.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. A copy is annexed as Appendix D. The opinion of the District Court which denied Patchogue's motion for injunctive relief was delivered from the bench and accordingly is not reported. A copy is annexed as Appendix C. A copy of the decision of the Secretary imposing the sanction from which the injunctive relief was sought is annexed as Appendix A.

JURISDICTION

Pursuant to F.R.A.P. Rule 41(b) the Court of Appeals stayed its mandate by order dated August 26, 1986. A copy is annexed as Appendix E. This petition is filed pursuant to 28 U.S.C. §1254(1), within the time allowed by law.

STATUTES

The principle statute involved is 42 U.S.C. §1395cc(f). A copy is annexed as Appendix F.

STATEMENT OF THE CASE

Patchogue is a "skilled nursing facility" as defined by 42 U.S.C. §1395x(j), in New York State, and since 1977 has been a provider of services under both the federal Medicare (42 U.S.C. §1395 *et seq.*) and Medicaid (42 U.S.C. §1396 *et seq.*) programs.

As such, it is subject to governmental scrutiny to ensure compliance with eighteen conditions of participation set forth in 42 U.S.C. §1395x(j) and 42 C.F.R. §405.1101 *et seq.*

The federal statutory regulatory scheme provides that the appropriate state agency, which in New York is the New York State Department of Health ("DOH"), is entrusted with the responsibility to conduct periodic surveys of all Medicaid and Medicare facilities and to report its findings and recommendations to HHS. 42 U.S.C. §1395aa. During 1985, DOH found Patchogue to be out of compliance with two conditions, and recommended to the Secretary that it be punished by being precluded from receiving payments for new Medicare and Medicaid admissions.

This type of sanction was authorized by Congress in 1980 when it enacted section 916 of the Omnibus Reconciliation Act, 42 U.S.C. §1395cc(f), and constitutes a form of punishment where noncompliance is found by the Secretary to be substantial but not sufficiently serious to warrant termination from the Medicare and Medicaid programs or decertification of the facility. Thus, under §1395cc(f)(1)(B), the sanction can only be imposed if the Secretary determines that the facility's deficiencies "do not immediately jeopardize the health and safety of its patients." Otherwise, termination is mandated. 42 U.S.C. §1395cc(f)(1)(A).

The statute provides that before the Secretary can mete out this punishment he must give the facility "reasonable notice and opportunity for a hearing." 42 U.S.C. §1395cc(f)(2). Once imposed, the ban on payments continues until the Secretary subsequently finds that the facility is in substantial compliance or is making good-faith efforts to achieve substantial compliance. If, however, the facility is not found to be in substantial compliance "with the end of the eleventh month following the month" of the Secretary's decision, "the Secretary shall terminate such facility's agreement or provide for termination of such facility's

certification." 42 U.S.C. §1395cc(f)(3).

On January 2, 1986, the Secretary accepted DOH's recommendation and determined that Patchogue should be banned from future Medicaid and Medicare payments pursuant to 42 U.S.C. §1395cc(f)(1)(B). Believing that Congress only intended to require him to provide an informal pre-deprivation hearing under 42 U.S.C. §1395cc(f)(2), he would not allow any form of testimony or require the appearance of the surveyors for questioning, limiting the hearing to the receipt of a written submission and oral argument by the facility's counsel.

The District Court Decision

Patchogue sought preliminary injunctive relief from the imposition of the ban from the District Court claiming, *inter alia*, that Congress intended more than the type of pre-ban hearing which the Secretary afforded and, alternatively, that the pre-deprivation hearing process was constitutionally infirm under the due process clause.

After taking testimony regarding economic losses which the facility was likely to suffer by reason of the ban and the damage to its reputation as a quality facility,[1] the Court found "that there is substantial harm that will result to the plaintiff from the ban."

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[1] Patchogue's projected economic loss amounts to $10,300 per month in federal funds and an additional actual loss of approximately $40,000 in state reimbursements. See, Appendix, 38a. Since Patchogue is authorized to provide services to at most 120 Medicare or Medicaid beneficiaries (Appendix, 32a), and since by reason of the aged and infirm nature of the patient population vacant beds will undoubtedly become available in significant numbers during any protracted period of banning, the shutting off of payments for new Medicaid and Medicare admissions is tantamount to a form of economic starvation and a gradual *de facto* termination of the facility.

(27a)[2] However, the Court believed that the pre-ban process which the facility received was sufficient to satisfy any statutory or constitutional pre-conditions to the imposition of the ban, and therefore did not grant preliminary injunctive relief.

The Circuit Court Decision

In affirming, the Circuit Court, in addressing these issues[3] first held that Congress intended that the pre-ban hearing need only be an informal hearing, consistent with the current practice of a "non-evidentiary administrative hearing afforded to facilities before their provider agreements are terminated." (43a)

As for Patchogue's constitutional challenge, the Court, after acknowledging that "health care providers have a constitutionally protected property interest in continued participation in the Medicare and Medicaid programs," ruled that this type of informal hearing was sufficient to satisfy due process entitlements.

Relying upon the proposition that a pre-deprivation hearing "need not be elaborate...and, in general, 'something less' than a full evidentiary hearing is sufficient." (*Cleveland Board of Education v. Loudermill*, ___U.S.___, 105 S. Ct. 1487, 1495 [1985], quoting from *Mathews v. Eldridge*, 424 U.S. 319, 343 [1976]), the Court, after weighing the requisite interests identified in *Mathews*, concluded that pre-deprivation process was constitutionally provided. (44a—47a).

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[2] Numerical references followed by the letter (a) are to the pages of the Appendix.

[3] The Court also passed upon other issues, such as the effect of the failure of HHS to adopt regulations, which in petitioner's opinion do not serve as additional bases for granting certiorari, and hence are not now raised.

In reaching this decision, the Court, having noted that "[p]roviders are not entitled either under the Act or under constitutional due process standards to a full administrative hearing prior to termination of their provider agreement" (43a), reasoned that "[i]t certainly would be anomalous to impose more stringent procedural requirements where the Secretary has opted to impose a less severe sanction." (46a)

The Absence of Post-Ban Process

The statutory and regulatory scheme provides for a full evidentiary hearing before an administrative law judge after termination. 42 U.S.C. §1395ff(c); 42 U.S.C. §405(b); see *Case v. Weinberger*, 523 F. 2d 602, 609-611 (2d Cir. 1975). Under the Medicaid rules, this hearing must be offered within 120 days after the effective date of termination. See 42 C.F.R Part 431, Subpart D. There is no provision for such a hearing for the imposition of sanctions short of termination, and indeed the Government has consistently maintained that it will not offer Patchogue any kind of post-ban hearing, a position now buttressed by the recently adopted "Intermediate Sanction" regulations. 51 Fed. Reg. 24,484 (July 3, 1986). The rationale for denying post-ban process is stated by the Secretary in his discussion of the hearing provisions of these regulations, as follows:

> We are not providing any additional hearing rights for the intermediate sanction for two reasons. First, while the denial of payments will no doubt impose a hardship of varying degrees upon affected facilities, this sanction is, by definition, a lesser one than termination and, accordingly, does not require the formal hearing that is appropriate for termination actions. We consider that the informal hearing is fully adequate to resolve the issues that prompted imposition of the intermediate sanction. Second, should a facility

> fail to achieve full compliance with program requirements before the expiration of the 11-month intermediate sanction, and thereby face termination, it would be entitled to the full evidentiary hearing that accompanies all terminations under both the Medicare and Medicaid programs. 51 Fed. Reg. 24,488 (July 3, 1986).

REASONS FOR GRANTING THE WRIT

In *Cleveland Board of Education v. Loudermill*, ___ U.S. ___, 105 S.Ct. 1487 (1985), this Court, in giving its approbration to a pre-termination process prior to dismissal of a tenured public employee that was limited to notice of charges, an explanation of the employer's evidence, and an opportunity for the employee to present his side of the story, rested its holding in part "on the provisions in Ohio law for a full post-termination hearing", stating, further, that "[a]t some point, a delay in the post-termination hearing would become a constitutional violation." *Id.* at 1496.

The ultimate issue in *Loudermill* centered, therefore, on the issue of "administrative delay" in the rendering of post-termination process. Since the Court was satisfied that post-termination process provided for a full evidentiary hearing, and that the complaint did not present a proper basis for discourse on the issue of administrative delay, it approved of the limited non-evidentiary pre-deprivation process, concluding:

> We conclude that all the process that is due is provided for by a pretermination opportunity to respond, *coupled with post-termination administrative procedures* as provided by the Ohio statute. *Id.* at 1496; emphasis added.

Implicit in all this, as Justice Brennan noted in his dissenting opinion, is that "a full post-termination hearing and decision must be provided at 'a meaningful time'." *Id.* at 1499.

Indeed, in all those cases where the Court has sanctioned something less than a full pre-deprivation hearing, provisions existed for full post-deprivation process. Typical is the seminal case of *Mathews v. Eldridge,* 424 U.S. 319 (1976), where in holding that an evidentiary hearing is not required prior to the termination of disability benefits, the Court noted that the prescribed procedures "also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of [the] claim becomes final." *Id.* at 349.

One suspects that all these cases would have been decided otherwise if the affected party did not have the right to a full post-deprivation administrative hearing. Indeed, the Court in *Loudermill* has acknowledged that "the existence of post-termination procedures is relevant to the necessary scope of pretermination procedures." 105 S.Ct. at 1496, ftnote 12.

The present case presents to the Court the issue of whether a non-evidentiary, pre-deprivation hearing can satisfy due process in the absence of provision for a full post-deprivation hearing. Petitioner believes that this issue has yet to be addressed by the Court and that it is the logical sequence to *Loudermill.*

Unless it is terminated, Patchogue never will be afforded the opportunity for a full evidentiary hearing to determine the propriety of the Government's ban.

The imposition of a ban, even if ultimately lifted by the Government, while not of the death-knell nature of a termination, is nonetheless sufficiently serious to warrant full due process protection since it has a potentially ruinous economic effect upon

the facility and certainly destroys its reputation as a quality operation.[4]

While the Government is obliged to lift the ban if it subsequently determines that the facility has come into compliance or is making a good-faith effort to do so, the facility, should that occur, would never have the opportunity for an adjudication of whether the ban was properly imposed in the first instance. Thus, the economic loss suffered during the period of the ban could not be recouped, nor the stigma removed.

If, on the other hand, the ban is never lifted, the facility must wait until it is ultimately terminated before the propriety of the ban could possibly be addressed. This would entail a minimum wait of at least eleven months (*see again*, 42 U.S.C. §1395(f)(3)) and the obvious economic starvation of the facility, followed by an indeterminate period of time for the holding of the hearing and the rendering of a decision.

The Circuit Court is of the belief that since a ban is not as serious as a termination, due process can be fully satisfied by the simple expedient of an informal pre-ban hearing. The Court reasons that since case law holds that there is no right to a full evidentiary pre-termination hearing in termination cases, it would be "anomalous to impose more stringent procedural requirements where the Secretary has opted to impose a less severe sanction." (46a).

Termination cases have invariably involved emergency situations requiring immediate governmental action to prevent imminent danger to the patient population. They represent those

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[4] Indeed, subdivision 3 of §1395cc(f) provides that the Secretary is to give "notice to the public" of the ban.

situations where because of the need for instant governmental intervention the normal requirements of pre-deprivation process cannot be accommodated, and due process is deemed satisfied by a full post-deprivation hearing. *See, e.g., Case v. Weinberger*, 523 F.2d 602 (2d Cir. 1975).

It does not follow, however, that the full complement of due process entitlements are to be truncated where, as here, there is no immediate danger to the public health and safety.[5]

Patchogue reads the Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982), *Hudson v. Palmer*, ___ U.S. ___, 104 S.Ct. 3194 (1984), and in *Loudermill* as standing for the proposition that, depending on how the interests identified in *Mathews v. Eldridge*, *supra*, are balanced in each given situation, the Government must satisfy due process entitlements by providing either (1) a full pre-deprivation evidentiary hearing, (2) an informal pre-deprivation hearing, which may be of a non-evidentiary nature, followed by a full evidentiary post-deprivation hearing not entailing undue administrative delay, or (3) a timely full evidentiary post-deprivation hearing without first affording pre-deprivation process in limited emergency situations, such as where termination of a nursing home is indicated because of imminent danger to the health of its patients.

Whether, as here, due process can ever be accommodated by an informal hearing, without more, where significant property

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[5] Indeed, as the statute specifically provides, the Secretary cannot impose a ban, as contrasted with termination, unless he first determines that the facility's alleged deficiencies "do not immediately jeopardize the health and safety of its patients." 42 U.S.C. §1395cc(f)(1)(B).

rights are adversely affected by governmental action, is an important constitutional issue which the Court should address.[6]

Accordingly, the writ should be granted.

Dated: September 23, 1986

Respectfully submitted,

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[6] While the case comes to the Court in the context of a prelimiary injunction, the issue which the Court is asked to pass upon is one that does not entail the exercise of discretion but rests, rather, on the premise that the lower courts had "an erroneous view of the law which controls the pending suit." *Coca-Cola Company v. Tropicana Products, Inc.*, 690 F.2d 312 (2d Cir. 1982). As such, its resolution will finally determine this aspect of the litigation.

APPENDIX A—LETTER AND MEMORANDUM DATED JANUARY 2, 1986 AFFIRMING THE DETERMINATION OF MS. ANNEMARIE SCHMIDT, DIRECTOR, SCOB, DHSQ.

January 2, 1986

Mr. Paul C. Maggio
Administrator
Patchogue Nursing Center
25 Schoenfeld Blvd.
Patchogue, NY 11772

Dear Mr. Maggio:

After a careful review of the facts I have decided to affirm the determination of Ms. Annemarie Schmidt, Director, SCOB, DHSQ, and impose a ban on Medicare and Medicaid admissions to Patchogue Nursing Center. This ban will go into effect January 23, 1986. Public notice of this action will appear in Newsday on January 8, 1986.

The decision to impose this ban is based on my conclusion that the original determination, that Patchogue Nursing Center was not in compliance with all of the conditions of participation during the January 22, 1985 survey and the March 8, 1985 revisit is correct. In reaching this decision I have considered the results of the August 1, 1985 revisit, which disclosed continued condition level noncompliance, as well as the information you provided at the informal hearings on July 22, 1985 and October 11, 1985. I have enclosed a memorandum giving a more detailed explanation of my decision.

A reassessment of your facility will be made in the future to determine if we should rescind the ban, continue the ban or initiate

termination action. Should you at any time believe your facility is in compliance with all of the conditions of participation, please notify this office at once and we shall arrange for the State Health Department to resurvey your nursing home as quickly as possible.

Please be advised that I have notified the New York State Department of Social Services of this decision since they are bound to enforce this sanction under the Medicaid program. Should you have any questions regarding this matter, please contact me at (212) 264-1121.

Sincerely,

s/Alan J. Saperstein

Alan J. Saperstein
Associate Regional Director
Division of Health Standards and Quality

Enclosure

MEMORANDUM

Date	January 2, 1986
From	Associate Regional Administrator, DSHQ, HCFA
To	File
Subject	Patchogue Nursing Center; Alternative Sanction Redetermination

Issue

Should a ban on reimbursement for new Medicare and Medicaid admissions, known as an alternative sanction, pursuant to Section 1866(f) of the Social Security Act, be imposed upon Patchogue Nursing Center? The New York State Health Department has advised HSQ that the facility is out of compliance with the

conditions of participation for Governing Body and Management (42 CFR 405.1121) and Dietetic Services (42 CFR 405.1225) and has recommended imposition of a ban on admissions. However, the nursing home has denied that it is out of compliance with any conditions and has stated that it believes the Health Department's findings are due to surveyor incompetency and prejudice.

Fact

On January 22, 1985 the annual survey at Patchogue Nursing Home disclosed two (2) conditions unmet: Governing Body and Management and Dietetic Services. The interim visit on March 8, 1985 confirmed that these conditions remained out of compliance. By letter dated June 14, 1985 from Ms. Annemarie Schmidt, Director, SCOB, the facility was notified that HSQ intended to impose a ban on reimbursement for new Medicare and Medicaid admissions to the SNF because of condition level noncompliance, and offered the facility an opportunity to meet at an informal hearing prior to imposition of the sanction. Patchogue Nursing Center accepted the offer, and met with representatives of HSQ and the New York State Health Department at an informal hearing on July 22, 1985.

During the informal hearing the facility repeatedly denied that it was ever out of compliance with a condition of participation and that the facts presented by the New York State Health Department were incorrect. The administrator/owner, Mr. Paul C. Maggio, submitted extensive documentation in which he expressed his view, reiterated during the informal hearing, that the State Health Department's negative recommendation was due to the incompetency and prejudice of its survey staff. He also requested in correspondence to this office, and at the informal hearing, that a neutral, unbiased surveyor visit his facility to verify his position.

Since the SNF's principal response in both correspondence and at

the informal hearing was that the findings were incorrect due to alleged New York State Health Department incompetency and prejudice, and in order to provide the facility every opportunity to continue in the program without sanction, I decided to accede to the facility's request for a "neutral" surveyor. I directed the New York State Health Department to conduct another revisit, accompanied by a federal surveyor, which took place on July 31 - August 1, 1985. The New York State Health Department advised me that condition level noncompliance continued at the facility. The federal surveyor who observed the revisit reported that it was conducted in a fair and professional manner and that she concurred with the New York State Health Department's findings and recommendations. In a letter dated September 24, 1985 I notified the nursing home of the findings and offered them an opportunity to resume their informal hearing so as to discuss the situation before I made a final determination. The facility accepted my offer and the informal hearing was continued on October 11, 1985.

Mr. Maggio requested a postponement because of health problems, among other reasons. He did not attend the continued hearing on October 11, 1985 but his facility was represented by two attorneys, Mr. Frederic Block and Mr. Richard Hamburger. Mr. Block was present during the informal hearing on July 22, 1985. The facility continued to dispute the findings of condition level noncompliance. The nursing home also disputed the basic survey process arguing that it is subjective and unreliable. At the end of the informal hearing I advised the facility that I would carefully review all of the survey documentation as well as the extensive written information provided by the SNF before making a final determination. The informal hearing which was held on July 22, 1985 and October 11, 1985 lasted for over six hours.

Review

The nursing home has presented various arguments against imposing the ban which can be grouped into three broad categories:

1. Findings were incorrect due to state surveyor incompetency and prejudice.

2. The survey process is subjective and therefore unreliable.

3. The deficiencies cited do not justify the determination of condition level noncompliance.

With regard to the question of state surveyor competency and prejudice, this office has done all that it reasonably can do to resolve this issue. As already mentioned, I acceded to the facility's request and sent a federal surveyor to observe the July 31 - August 1, 1985 revisit. She reported that the survey was conducted in a fair and competent manner and she concurred with the findings of condition level noncompliance. There is no evidence to suggest that the state has surveyed this SNF in anything but a professional manner. In addition, contrary to allegations made by the facility, the New York State Health Department has offered to assist the SNF in complying with the regulations. Regrettably the SNF has rejected or ignored all offers of assistance.

The facility's second argument, that the survey process is unreliable, is without merit. On the second date of the informal hearing, as well as in the written documentation submitted to me, the nursing home argued that only the Periodic Medical Review (PMR) should be considered in determining compliance with the regulations. While the PMR is a review of the quality of care rendered to residents at a nursing home by measuring patient outcomes, (i.e. number of patients suffering from decubiti or

exhibiting weight loss). PMR findings do not provide a basis for certification. Rather, PMR findings are used as a screen, in that if the percentage of patients exhibiting problems exceed state norms, then an "intensive" survey of that particular area is conducted. The "intensive" survey reviews a facility's compliance with regulation requirements and is the basis for certification. The facility has claimed that since it is now in compliance with the PMR, the results of the "intensive" survey should be ignored. The claim of compliance with the PMR is based on a review conducted by the nursing home itself.

This argument is flawed in several respects. The intensive survey was triggered by the SNF's PMR failure in Menus and Nutritional Adequacy (weight loss) and Sanitary Conditions. Thus even if the PMR in weight loss was met, Sanitary Conditions would still be not met. Furthermore, I cannot possibly accept the results of the facility's own personal review of itself. This industry is not self-regulating and self-surveys are not a substitute for those conducted by the regulating body. It seems superfluous of me to note the obvious conflict of interest that would exist if we permitted SNF's to survey themselves. Furthermore, the argument that I should ignore the results of the full survey is one I cannot possibly follow.

Although the facility "may" meet the PMR today, it did not at the time of the survey. Consequently, a full survey was triggered which disclosed serious deficiencies at the SNF. The survey process was established by Congress through statutes and implemented by the Department of Health and Human Services through the regulations. I am bound to follow the statutes and regulations and I cannot alter the survey process because one facilty is unhappy with the survey results.

The facility's third objection is that the deficiencies cited do not justify the finding of condition level noncompliance. During the informal hearing on Octoer 11, 1985, the SNF argued that the

deficiencies cited represented only isolated problems and do not constitute either long term and/or systemic problems. However, a review of the following material indicates otherwise. Since the condition Governing Body and Management was marked not met primarily because of deficiencies cited under Dietetic Services, I have limited my review to the latter condition. For each standard marked not met under Dietetic Services, I have noted the deficiencies that put the standard out of compliance for each of the three surveys as well as citing some of the specific examples that support the findings of the systemic problems in the delivery of dietetic services at Patchogue Nursing Home. I have also responded to some of the points the facility raised regarding specific findings at the informal hearing and in its written arguments.

F177, CFR 405.1124 (f) Supervision of patient nutrition. Not Met

Deficiencies cited under this standard were cross-referenced to standard F 221 CFR 405.1125(b) Menus and nutritional adequacy, under Dietetic Services.

January 22, 1985:

1. Patient observed calling for help, "Please get my food, I'm hungry." Her tray had been placed by her bedside at 7:15 A.M. but by 7:55 A.M. she had still not been fed.

2. Breakfast trays were placed by beds of sleeping patients between 7:15 A.M.-7:20A.M. and patients were left sleeping until 7:58 A.M. to 8:15 A.M.

3. Several patients were poorly positioned to feed themselves. One was observed lying on the side rail of her bed. As she brought the coffee to her head she poured it in her hair.

March 8, 1985:

1. Breakfast tray left by bedside of sleeping patient (food temperatures were cereal-102° F and egg-84° F).

2. Patient was not repositioned, resulting in her being left with tray and tray stand higher than her head. She asked surveyor "Is there milk in my coffee" and stated "my arms are tired."

3. Unattended patient observed eating egg shells. She was unable to eat breakfast with the plastic utensils since they would not break into the white of the egg. She was observed crying and groping at items on the tray and dropping them.

August 1, 1985:

1. Patient was waiting twenty minutes for food while tablemates were eating; she was banging on the table saying "where is my food supper."

2. A poorly positioned blind patient was left with a tray she could not reach. Despite her calls for help no assistance was provided until 15 minutes after the initial observation.

3. At a five patient table, three patients were served at 5:05 P.M. while the other two were not served until 5:32 P.M. One of the other patients became extremely agitated and had several loud shouting matches with his tablemates while calling out for his food.

These deficiencies indicate a systemic failure on the part of the facility's staff to promptly assist patients who need help in feeding. Food trays are left with patients incapable of feeding themselves, while other patients are forced to wait for food while their tablemates eat. In addition, failure to provide prompt assistance to

patients whose food trays have been delivered, contributes to the problem of food being served at temperatures which do not ensure palatability and consumption.

In its written material to me, the SNF states that this standard is under Nursing Services rather than Dietetic Services and therefore is not a valid basis for a ban. But what the facility fails to note is that the deficiencies cited under this standard were cross-referenced to standards under Dietetic Services in all three surveys. Deficiencies can, and often do, impact upon more than one standard and when they do they are cross-referenced to cover all of the appropriate regulations. This policy is followed in all surveys, including surveys previously conducted at the facility.

The SNF also claims that since the overwhelming number of Patchogue residents require some assistance in eating, and because it does not have a one to one staff/resident ratio, it is axiomatic that some will receive assistance before others. It is against this background that the facility claims the deficiencies should be considered. However, the overwhelming majority of nursing homes are able to promptly assist patients who need help being fed, and they do so without a one to one staff/patient ratio. Through a proper utilization of staff and the use of an appropriate delivery system, SNFs avoid forcing patients watch others eat while going hungry themselves, or leaving food trays out, letting the food go cold while patients vainly attempt to feed themselves while awaiting assistance. The suggestion that these problems are unavoidable is not supported by the facts as evidenced by the performance of the majority of nursing homes in this country.

F208, CFR 405.1125(a) Staffing. Not Met

January 22, 1985:

1. Problems in the area evidenced by deficiencies cited under

standards F221-Menus and nutritional adequacy, F222-Therapeutic diets, F237-Preparation and service of food and F244-Sanitary Conditions.

2. Of sixteen (16) patients reviewed for weight loss or low weight status there was no evidence to determine its cause in eleven (11) cases.

3. In-service programs given to staff have not been appropriate or effectively developed to teach dietary employees skills required to perform day to day tasks.

March 8, 1985:

1. The dietary department is not appropriately staffed as the Food Service Supervisor, Dietician and Head Cook have resigned.

2. Coverage is not maintained, i.e. sick day, vacations, etc.

3. The dietician's monthly report does not reflect any problems in the department nor does it apprise the administrator of resolutions to cited deficiencies.

4. Problems in this area continue as evidenced by deficiencies cited under standards F-177 Supervision of patient nutrition, F221-Menus and nutritional adequacy, F222-Therapeutic Diets and F237-Preparation and service of food.

August 1, 1985:

1. Despite efforts to correct some deficiencies, problems in this area as evidenced by deficiencies cited under standards F221-Menus and nutritional adequacy, F222-Therapeutic Diets, F230-Frequency of meals and F237-Preparation and service

of food.

2. The supervisor was observed preparing different sandwiches because as she explained, the staff was confused over whether or not patients requiring 1,200 and 1,500 caloric diets were to receive grilled cheese sandwiches or plain cheese sandwiches.

3. The Food Service Supervisor was not spending enough time supervising but rather was functioning as a diet aide-cook. This was evidenced by her being observed preparing sandwiches and the fact that none of the completed trays were checked for accuracy prior to transport to patient units.

The sustained level of dietetic problems exhibited by the facility over and eight-month period as evidenced by the above deficiencies, demonstrates that the SNF's dietetic service supervisor is not providing appropriate supervision. The dietician is not providing appropriate guidance to the dietetic supervisor and dietary personnel, nor has she apprised the administrator of problems within the dietary department. The deficiencies under Supervision of patient nutrition (42 CFR 405.1124(f)) indicates that the dietary department does not maintain continuing liaison with medical and nursing staffs.

The most significant response the SNF has made to these deficiencies is its decision to hire additional staff. During the informal hearing on October 11, 1985 and in its written material the facility stated that a full-time food service supervisor, a full-time food service director, and a weekend food service supervisor were hired after the July 31-August 1, 1985 revisit. Whatever assistance these people may provide the facility, they were not working at the facility during any of the three surveys. If, of course, the SNF had hired these people after the first, and even after the second survey, they might have made an impact on the problems at the facility. The fact that the SNF eventually did hire these people

is, in itself, a recognition that dietetic supervision has not been adequate. My review is by necessity limited to the condition of the nursing home during the three surveys, not what has occured afterwards. The fact that serious deficiencies existed at the facility, and were allowed to persist over at least an eight-month period, is proof of inappropriate dietetic supervision.

F221, CFR 405.1125(b) Menus and nutritional adequacy. Not Met

January 22, 1985:

1. Each patient was to receive four ounces of Wheatina as per the menu. But actually each one received only two tablespoons of oatmeal floating in milk.

2. Each patient was supposed to receive a three ounce portion of meat but because the wrong scoop was used they only received 1.84 ounces.

3. Menus sometimes indicated "diet fruit" or "puree meat" without specifying the actual type.

4. Some foods are served to patients requiring a puree diet (to be served with a syringe) which could not be put in a syringe, i.e. bread, dinner rolls.

5. It was observed at one breakfast that 75% of the patients did not complete their meal and approximately 25% ate very little.

6. The cook was observed preparing salisbury steak without using a recipe and left out the tomato juice listed on the recipe. In addition, the recipe only called for 25 pounds of chopped meat which is inadequate for 120 portions plus those requiring double portions. Additional meat was used after the

supervisor noted her concern.

March 8, 1985:

1. Measuring cups not available in dietary department from 6:30 A.M. to 6:30 P.M.

2. Patients requiring eight ounces of sustacal received six to six and one half.

3. Inappropriate amounts or types of food at the facility or ordered as indicated on the menus.

4. At breakfast the patients received hard cooked eggs instead of soft thus causing eggs not to be consumed.

August 1, 1985:

1. Patients received only 1½ to 1¾ oz. cheese instead of the planned 3 oz.

2. Diet pudding was not available for use although listed on the menu.

3. Without adequate assistance, patients cannot optimally consume food (see F177-Supervision of patient nutrition for details).

4. Patient supposed to receive two jellos at lunch, received none.

5. Menus failed to indicate planned alternatives. Food Service Supervisor who provided menus said they were the ones currently in use although they were marked winter menu.

Although the facility has a nutritional analysis of the menu

indicating that the RDAs are met, it is not valid because the facility fails to actually serve the food in the quantities shown on the menu. In addition, there is a significant amount of plate waste. Many menu items are not specifically noted and puree menus are not planned and served with the same nutritional content as the regular menus.

The SNF has dismissed most of the deficiencies cited under this standard as "problems of paper compliance." As noted in page 49 of Mr. Maggio's affidavit, the facility does not view as significant problems: its failure to provide food listed on the menu; the fact that the alternative meal listed on the menu did not indicate that it was equal in nutritional value to the main selection; the fact that the alternative meals were not routinely pre-planned, and the fact that menu changes were not routinely recorded on posted menus. However, these types of deficiencies are very significant.

The purpose of a SNF is to provide health care to its patients. One of the most important aspects of that health care is the diet provided. The only way that a facility can ensure that a patient receives adequate nutrition is through the appropriate diet. But if the menus which have been developed to provide that diet are not followed, either by failure to provide a particular item in the designated quantity or through "unplanned" substitution, then the menus are of little value and there is no assurance that the patient is receiving the proper nutritional diet. The food may be good, but it is of unknown nutritional value. Furthermore, health surveyors are dependent upon the written menus in determining if patients are receiving appropriate nutrition. Since they cannot observe each and every meal all the time, they must depend upon the facility's documentation. But if, as the deficiencies cited during the three surveys indicate, the menus are inaccurate, then they cannot possibly determine if the patients are receiving the appropriate nutrition. The deficiencies cited support the conclusion that the standard for Menus and nutritional adequacy is not met.

F222 CFR 405.1125(c) Therapeutic Diets. Not Met

January 22, 1985:

1. In 17 of 19 physician diet orders reviewed for patients receiving puree food, there was no physician's order for a puree diet.

2. Patient has diet order for "regular," but is being fed through a syringe.

3. Patient was supposed to receive bran for breakfast to aid in constipation problems. Bran was not served.

4. The 1,500 caloric diet as computed in the diet manual totals 1,350 calories.

March 8, 1985:

1. Physicians are not ordering the consistency of food when needed for therapeutic reasons.

2. Facility policy is to cook food without salt, but salt was observed being poured into water for vegetables. (No measuring cups available).

3. Patients on diabetic diets were to receive 8 oz. of skim milk as per menu. Instead, some received 4 oz. of skim milk and some 8 oz. of whole milk.

4. The menu extension is not calculated for each therapeutic calculated diet. There is one category called "Diabetic," although some patients require 1,200, 1,500 and 1,800 caloric diets as per physician orders.

August 1, 1985:

1. Physicians are not ordering the use of a syringe to feed patients.

2. Facility fails to serve therapeutic diets in specific portion sizes (See F221-Menus and nutritional adequacy).

3. Patients requiring low salt received salted crackers and bean and bacon soup although diet manual specifically stated such foods were to be avoided.

4. Patient requiring 2,000 caloric diet was not under a specific meal pattern. Received a supper meal described under 1,500 caloric diet.

As the above deficiencies amply demonstrate, the SNF has established a pattern where the patients routinely fail to receive therapeutic diets of the appropriate amount and type. Furthermore physicians do not routinely order mechanical therapeutic modifications for patients requiring food other than whole food nor are therapeutic diets prepared and served as ordered by the physician or as described in the diet manual approved by the medical director. In addition, the diet manual is replete with errors and contradictions.

The deficiencies cited under this standard are similar to the ones noted under F221, Menus and Nutritional Adequacy, and so is the facility's response. On page 54 of Mr. Maggio's affidavit he dismisses most of these deficiencies with the comment that the surveyors should concern themselves with the overall situation. Once again the SNF fails to appreciate the importance of these particular deficiencies which taken together demonstrate a systemic failure on the part of the facility to provide patients with the appropriate diet, whether it be in terms of calories, nutrition, consistency or even simply low salt.

F230 CFR 405.1124(d) Frequency of meals. Not Met

January 22, 1985:

The nursing home's stated meal hours are 7:00 A.M., 11:30 A.M. and 5:00 P.M. But it was observed that 50% of the patients received breakfast between 8:00 A.M. - 8:15 A.M. Since the prevous dinner had arrived on the first and second floors between 4:30 P.M. - 4:45 P.M., there was a meal span between dinner and breakfast of approximately 15¼ hours instead of the permitted 14 hour span. In addition, bedtime nourishments were not routinely offered to all patients.

March 8, 1985:

Standard marked in compliance. Although the Food Service Director claimed the meal hours were still 7:00 A.M., 11:20 A.M. and 5:00 P.M., it was observed that breakfast was served as late as 8:15 A.M. and lunch at 1:00 P.M. It was noted that the system of staggering trays would work if a patient served breakfast at 7:30 A.M. had dinner at 5:30 P.M.

August 1, 1985:

Standard marked out of compliance again. Stated meal times are now 7-7:15 A.M., 11:30-12:15 P.M. and 5:00-5:30 P.M. But it ws observed that the first food truck left the kitchen with dinner at 4:50 P.M. while the first breakfast rack left the next day at 7:25 A.M. This is a span of 14½ hours.

On pages 51-52 of Mr. Maggio's affidavit, the SNF acknowledged that over 14 hours elapsed between meals, but claimed it was due primarily because of disruption caused by the survey as well as by the program of staggering the release of food trucks to help keep food warm. The facility's excuses for failing this standard are

without merit. Experience has demonstrated that this standard is one of the least likely to be out of compliance in this condition. The overwhelming majority of SNFs have repeatedly complied with this standard despite the "disruption" caused by a survey. I can see no valid reason why Patchogue should be an exception. Furthermore the same is true in regards to the use of a staggered release of food trucks. Many of the SNFs release food trucks on a staggered basis but are still able to deliver food at a palatable temperature within a 14 hour span. The facility's suggestion on page 39 of Mr. Maggio's affidavit that the facility is caught between two incompatible goals, serving food at a compatible temperature and within a 14 hour span, is refuted by the ability of the vast majority of SNFs to meet these requirements.

F237 CFR 405.1125(e) Preparation and Service of food. Not Met

January 22, 1985:

1. Vegetables are reheated the next day for puree diets thus destroying its nutritive value.

2. Examples of food temperatures: soft cooked egg 78° F, milk 67° F, tuna salad 64° F, cereal 77° F. Temperature of food leaving kitchen for one specific patient was puree meat 110° F and mashed potatoes 90° F. However, the patient did not eat the food until 50 minutes later.

3. Patients on puree diet received instant mashed potatoes instead of regular ones. Mashed potatoes served one week 11 out of 14 meals (lunch and dinner).

4. Patients received only soft cooked eggs and orange juice. They were not offered scrambled, fried or poached eggs nor pancakes or french toast.

March 8, 1985:

1. Examples of food temperatures: In kitchen: eggs 119° F, hot cereal 122° F. On patient units: eggs 81° F, 79° F and 73° F. Problem in part due to staggering of trays.

2. Breakfast limited to hot cereal, juice and soft cooked eggs. Patients not offered pancakes, french toast, etc.

3. Staff reports that patients are choking or gagging on food due to the speed at which they are fed to satisfy the administrator's demands.

August 1, 1985:

1. Patient declined a grilled cheese sandwich because she said it was stuffed with foil. She declined a second sandwich which was soggy and wet. No alternative food offered.

2. At 2:50 P.M. puree vegetables were held in oven. Vegetables were to be consumed between 5:00-6:00 P.M. This practice causes excessive nutrient loss.

3. At breakfast the toast was not consumed on 12 of 15 trays observed because the bread had been burnt black.

4. Patient requiring mechanical modification of food received cheese strada which had hardened into a lump.

5. Examples of food temperatures: milk 61° F, orange juice 62° F, egg custard 76° F, cole slaw 62° F and cheese stada 111° F.

The above deficiencies demonstrate that through three surveys the facility still does not prepare food by methods that ensure its palatability. In addition, there is an insufficient variety of food and

the food is not served in a form to meet individual patient's needs. Finally, the food is not planned, prepared or served for patients requiring a puree diet as it is for those on a regular diet.

Improper cooking procedures (i.e. holding puree vegetables in the oven for an excessive period of time) destroy the nutritional value of the food. Rather than adopt standard cooking procedures the SNF has chosen to either ignore the problem or deny its existence. Repeatedly, the facility has blamed the deficiencies on the character and competence of the surveyor. I can only again note that the surveyor who cited the deficiencies is a Registered Dietician (RD) as are the other Federal and State surveyors who observed the survey and concurred with its findings.

With regard to food temperature, I cannot dismiss the numerous deficiencies cited, as the SNF does, on the grounds that what constitutes the "proper" food temperature is "merely a matter of subjective opinion between the surveyor, the residents and myself (Mr. Maggio)". Besides the potential health risk, food temperature impacts upon the palatability of the meals. Common practice and experience have shown that certain foods are generally believed to be more palatable at particular temperatures. I find it difficult to believe that the residents of Patchogue, prefer their milk warm, their eggs cold, or their toast burnt.

The same is true with regard to the lack of variety of food offered. Although some foods are preferred over others it is difficult to believe that, if given the choice, so many residents would willingly choose the same basic meals over and over again. Although I am aware that the SNF claims to have offered the residents a choice on one occasion (pg. 43 of Mr. Maggio's affidavit), I cannot help but consider if the patients' unhappiness with the scrambled eggs had more to do with how they were prepared and served (i.e. cold), that with the style of the eggs itself.

F244: CFR 405.1125(g) Sanitary Conditions. Not Met

January 22, 1985:

1. Examples of food temperatures: oatmeal with milk (on the steam table) 114° F, skim milk 61° F, tuna salad 64° F, and puree meat 105° F.

2. Improperly wrapped food items in refrigerator included chicken and margarine.

3. Three dented cans of mashed potatoes noted in store room.

4. Apple sauce left uncovered in kitchen during entire breakfast service.

5. Rinse temperature in dishwasher only 174° F. Manufacturers specifications state it should be 180° F.

March 8, 1985:

1. Dented can of mashed potatoes was opened and used.

2. Utensils sent through dishwasher when the wash and rinse temperatures were below the manufacturer's specifications.

3. During lunch service soiled patient trays, plates, and utensils were put on food carts holding clean patient food trays.

4. Potentially hazardous foods were at improper temperatures (no examples given).

August 1, 1985:

1. Examples of food temperatures: custard 53° F - 76° F, cheese

strata (on steam table) 123° F.

2. Food items not properly covered and so exposed to the surrounding environment.

3. Areas of floor, especially the corners, were soiled.

4. Floor of walk-in refrigerator rusted.

Potentially hazardous food should be kept at 45° F or below or 130° F or above. But all three surveys disclosed that the facility was keeping the food at improper temperatures for unnecessarily long periods of time. In addition, food items were consistently found to be improperly covered and exposed to the surrounding environment. Instances of dirt and debris were noted in the dietary area.

The SNF has referred to the deficiencies cited under this standard as "picayune" (pg. 54 of Mr. Maggio's affidavit), but the facts speak otherwise. The health department surveys have disclosed a deficient dietetic system which could lead to a dangerous situation due to the problems cited above. Although we are grateful that there has been no outbreak of food poisoning at Patchogue to date, we would be negligent if we waited until such a situation occurred, rather than take action against an obviously deficient system.

Potentially hazardous food must be kept at certain temperatures. This is not "picayune" nor "merely a matter of subjective opinion," (pg. 34 of Mr. Maggio's affidavit). In some cases the SNF has claimed that the food temperature were taken incorrectly, or, indeed, reported incorrectly. The facility has attributed this to incompetency as well as a "malicious attitude" on the part of a particular surveyor. But the surveyor in question is a Registered Dietician, and is certainly well qualified. Furthermore, at the SNF's request, representatives from both this office as well as the

New York State Health Department Central Office, observed both the third survey and the surveyor in question. These observers, who are themselves Registered Dieticians, reported that the survey was conducted in a fair and competent manner.

On page 57 of Mr. Maggio's affidavit the SNF noted a deficiency which it felt illustrated the hostile and predetermined attitude of the surveyors. In this instance a cheese strata that was served to a patient was brought back to the kitchen, blenderized, and reheated (to a temperature of 126° F). The facility states that there is nothing wrong or unsanitary, in this process. On the contrary, quite apart from the matter of palatability, the SNF risks the possibility of contaminating kitchen equipment (i.e. blender) with food already tasted by a patient.

Another area where the SNF questions the integrity of the surveyors was in regards to deficiencies of dirt and debris. In some cases the SNF simply denies their existence while in others it denigrates its importance or claims that it does not constitute a deficiency. I can only repeat that I have done all that I can to ensure a fair survey. The accuracy, as well as the competency of the local health department surveyors have been vouched for by both representatives of the New York State Department of Health, Central Office and federal observers. I have considered the responses Mr. Maggio made on behalf of his facility, but I must note that unlike the surveyors, he is not a Registered Dietician, a sanitarian or unbiased.

Conclusion:

A review of the survey documentation clearly demonstrates that condition level noncompliance in the areas of Dietetic Services (42 CFR 405.1125) and Governing Body and Management (42 CFR 405.1121) have existed at this facility since the annual survey in January 1985. Dietetic Services is out of compliance due to the

many deficiencies cited in this review while Governing Body and Management is out of compliance because it is the responsibility of the facility's management to ensure that the SNF complies with the applicable regulations. Although the specific deficiencies cited during each of the surveys may vary, the underlying or systemic problems remain constant. This SNF does not have in place a dietary system which ensures that the residents receive the correct meals, including therapeutic meals, as part of a planned diet, in a manner that promotes consumption.

In reviewing this material I cannot help but note Mr. Maggio's massive involvement in the dietary department. Based on what I observed during the informal hearing as well as what I gleaned from his affidavit, he appears to make every major dietary decision with little or no input from the facility's dietician and food service supervisor. While it is very important for the operator/administrator to take an active part in running the facility, certain matters should be left to the appropriate professional. No matter how well intentioned he may be, or well qualified in other areas, he is not a Registered Dietician.

The general impression I have drawn from the available evidence, especially the material Mr. Maggio submitted, is a dietary department that is not operated in a professional manner. Consequently, I have no choice but to affirm Ms. Schmidt's original determination and impose the alternative sanction on Patchogue Nursing Center.

APPENDIX B—ORDER BY HON. JACK B. WEINSTEIN, UNITED STATES DISTRICT JUDGE, DATED JANUARY 31, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PATCHOGUE NURSING CENTER
Plaintiff,

-against-

OTIS R. BOWEN, M.D., as Secretary of the United States Department of Health and Human Services and DAVID AXELROD as Commissioner of the New York State Department of Health,
Defendants.

File = 86-CIV-0146

ORDER

(WEINSTEIN, J.)

This matter having come before the Court by Motion for a Temporary Restraining Order and order to show cause for a Preliminary Injunction, and the parties having appeared and presented evidence and argued on January 17, 24 and 27, 1986, it is, for reasons stated orally on the record

ORDERED, that the motion for a Temporary Restraining Order and Preliminary Injunction is hereby denied.

SO ORDERED

s/ Jack B. Weinstein

JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE

Dated: Brooklyn, New York
January 31, 1986

APPENDIX C—EXCERPT OF DECISION BY HON. JACK B. WEINSTEIN, UNITED STATES DISTRICT JUDGE, DATED JANUARY 27, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

.....

PATCHOGUE NURSING CENTER,
Plaintiff,

-against- ! CV-86-0146

OTIS R. BOWEN, M.D. As Secretary HHS, et al.
Defendants.

.....

United States Courthouse
Brooklyn, New York

January 27, 1986
4:30 p.m.

BEFORE:

HONORABLE JACK B. WEINSTEIN, CHIEF JUDGE

HOWARD GOODMAN
COURT REPORTER

APPEARANCES:

BLOCK & HAMBURGER, ESQS.
Attorney for plaintiff

BY: FREDERIC BLOCK, ESQ.

DRECHSLER & LEFF, ESQS.
Co-Counsel for plaintiff

BY: JEFFEREY A. RUSS

RAYMOND J. DEARIE, ESQ.
United States Attorney for the
Eastern District of New York

BY: PATRICIA GALVIN, ESQ.
Assistant U.S. Attorney
and
CONNIE RAFFA, ESQ.
Assistant Regional Attorney
H.H.S.

ATTORNEY GENERAL OF THE
STATE OF NEW YORK

BY: JUDITH KAUFMAN, ESQ.

THE COURT: The Court finds that there is substantial harm that will result to the plaintiff from the ban. However, it does not find that there is a substantial likelihood of success in this case on the injuction.

In view of the nature of the prompt decision on the matter, a briefing schedule, originally discussed will not be appropriate. Therefore, it will really not be possible for this Court to write an opinion on the matter, although it's a matter of first impression. It does seem to me, that considering the negotiations back and forth and the various conferences and exhibits and other things referred to during the course of the testimony, that the plaintiff was fully

advised of the complaints of the government, they were sufficient to warrant a ban. They constituted a series of detriments to the quality of life of the residents, with respect to dietary matters.

Therefore, there is a substantial basis for the decision of the administrative agency — this Court does not have the power to go beyond those factors and grant a new hearing.

I find that there is no alternative — reluctantly, I deny the preliminary injunction. There is no reason to continue the stay which was in effect as a preliminary restraining order.

APPENDIX D—DECISION OF CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JULY 25, 1986

UNITED STATES COURT OF APPEALS
For The Second Circuit

No. 1019—August Term 1985
(Argued March 13, 1986 Decided July 25, 1986
Docket No. 86-6036

PATCHOGUE NURSING CENTER,
Plaintiff-Appellant,

—against—

OTIS R. BOWEN, M.D., as Secretary of the United States Department of Health and Human Services, and DAVID AXELROD, as Commissioner of the New York State Department of Health,
Defendants-Appellees.

Before:

CARDAMONE, PIERCE, and ALTIMARI,
Circuit Judges.

Appeal under 28 U.S.C. § 1292(a)(1) from an order of the United States District Court for the Eastern District

of New York, Jack B. Weinstein, Chief Judge, denying, in pertinent part, plaintiff Patchogue Nursing Center's motion for a preliminary injunction.

Affirmed.

FREDERIC BLOCK, Smithtown, N.Y. (Block & Hamburger, Esqs., Jeffrey Russ, Richard Hamburger, Steven B. Aptheker, and Judith Stoll, of Counsel), for *plaintiff-appellant*.

PATRICIA GALVIN, Assistant United States Attorney, Eastern District of New York, Brooklyn, New York (Reena Raggi, United States Attorney for the Eastern District of New York, Robert L. Begleiter, Assistant United States Attorney, of counsel) for *defendant-appellee*, Otis R. Bowen, M.D.

JUDITH KAUFMAN, Assistant Attorney General of the State of New York (Robert Abrams, Attorney General of the State of New York, Howard L. Zwickel, Assistant Attorney General, of counsel) for defendant-appellee David Axelrod.

JOEL M. HAMME, JACK N. GOODMAN and PAUL F. LEONARD, JR. (Pierson, Ball & Dowd, Washington, D.C.) submitted a brief for *the American Health Care Association, amicus curiae*.

CORNELIUS D. MURRAY, THOMAS F. GLEASON, SARAH W. BIRN, and MICHAEL RHODES-DEVEY (O'Connell and Aronowitz, P.C., Albany, N.Y.) submitted a brief for *New York State Health Facilities Association, Inc.*, amicus curiae.

ALTIMARI, *Circuit Judge*:

Appellant Patchogue Nursing Center ("Patchogue") appeals from an order of the United States District Court for the Eastern District of New York, (Weinstein, Ch. J.), denying in pertinent part its motion for a preliminary injunction. Appellant sought injunctive relief barring appellees, Otis R. Bowen, M.D., as Secretary of the United States Department of Health and Human Services (the "Secretary" or "HHS"), and David Axelrod, as Commissioner of the New York State Department of Health ("DOH"), from imposing the intermediate sanctions established by section 916 of the Omnibus Reconciliation Act of 1980, 42 U.S.C. § 1359cc(f), banning Medicaid and Medicare reimbursement for new admissions to skilled nursing facilities. Appellant contends that it is entitled to preliminary injunctive relief because (1) section 1395cc(f) cannot be utilized until the Secretary promulgates implementing regulations; (2) the Secretary has violated section 1395cc(f) by failing properly to follow the statutory due process procedures before adjudging appellant noncompliant with the requirements for participation as a provider of services in the Medicare program, *see* 42 U.S.C. § 1395x(j); 42 C.F.R. § 405.1101 *et seq.*; and (3) the Secretary deprived appellant of a constitutionally

protected property interest in violation of constitutional due process standards.

For the reasons stated below, we affirm.

BACKGROUND

Patchogue is a "skilled nursing facility," 42 U.S.C. § 1395x(j), authorized to provide services to at most 120 Medicare or Medicaid beneficiaries. Patchogue originally was accepted as a provider of services in the Medicare program effective January 1, 1977, and was issued its most recent provider agreement effective December 11, 1984.

On January 22, 1985, DOH, in accordance with 42 U.S.C. § 1395aa, conducted the first of several onsite surveys at Patchogue to determine compliance with the eighteen conditions of participation set forth at 42 U.S.C. § 1395x(j) and 42 C.F.R. § 1101 *et seq*. The state surveyors found Patchogue to be out of compliance with two conditions of participation: Governing Body and Management, 42 C.F.R. § 405.1121, and Dietetic Services, 42 C.F.R. § 405.1125.

The DOH surveyors held an exit conference with Paul Maggio, Administrator and owner of Patchogue, on February 8, 1985, to advise him of the survey findings. On February 13, 1985, DOH sent Patchogue a Statement of Deficiencies detailing the areas of noncompliance and providing citations to applicable regulations. In a letter accompanying the Statement, DOH requested a plan of correction from Patchogue and informed Patchogue of the possible sanctions for continued noncompliance.

DOH conducted an unannounced revisit survey of Patchogue on March 8, 1985. The surveyors apprised Mr. Maggio of their findings at an exit conference and, in a written statement, enumerated eleven deficiencies relating to the standard of "sanitary conditions," 42 C.F.R. § 405.1125(g).

Patchogue submitted a Plan of Correction dated March 18, 1985 to DOH. By letter dated May 13, 1985, DOH rejected the Plan of Correction as "unacceptable" and requested a revised Plan of Correction. DOH attached a statement to this letter explaining why the Plan was adjudged inadequate.

By letter dated June 6, 1985, DOH advised HHS that Patchogue was not in compliance with two conditions of participation and recommended that the intermediate sanction banning reimbursement for new Medicare and Medicaid admissions be imposed, 42 U.S.C. § 1395cc(f). Patchogue was notified of the possible ban by letter dated June 14, 1985. Patchogue also was informed that it could request an informal hearing in order to present evidence contradicting the finding of noncompliance.

On July 22, 1985, an informal hearing was held at which Patchogue denied that it was ever out of compliance with the conditions of participation and accused DOH of incompetence and prejudice. Patchogue requested that another revisit survey be conducted and that a neutral federal surveyor accompany the state survey team. At the hearing DOH furnished Patchogue with a copy of an interim survey report regarding the March 8, 1985 resurvey which it had previously failed to provide.

A revisit survey was conducted on July 31 and August 1, 1985 by DOH surveyors accompanied by a neutral

Federal Nutrition Consultant and DOH officials from Albany. The survey disclosed that the conditions of Governing Body and Management and Dietetic Services remained out of compliance. An exit conference was held on August 1, 1985 at which DOH officials advised Mr. Maggio and his staff of their findings. DOH sent a copy of its interim survey report as well as a Statement of Deficiencies to Patchogue. The Federal Nutrition Consultant sent a copy of her report which concurred with DOH's findings to Mr. Maggio's attorney.

On September 24, 1985, HHS notified Patchogue of its intent to institute a ban on reimbursement and offered Patchogue an opportunity to address the results of the July 31/August 1 survey in an informal hearing.

A second informal hearing was held at Patchogue's request on October 11, 1985. On January 2, 1986, HHS issued a decision concluding that Patchogue had not complied with federal regulations and that a ban on reimbursements should issue pursuant to 42 U.S.C. § 1395cc(f) with public notice scheduled for January 8, 1986.

On January 14, 1986, United States District Court Judge Leonard D. Wexler issued an order to show cause and a temporary restraining order. Chief Judge Weinstein denied the request for a preliminary injunction after an evidentiary hearing.

DISCUSSION

Medicaid, 42 U.S.C. § 1396 *et seq.*, is the program of medical assistance to indigents who are recipients of either Aid to Families with Dependent Children

("AFDC", 42 U.S.C. § 601 *et seq.*) or Supplemental Security Insurance program for aged, blind or disabled poor ("SSI", 42 U.S.C. § 1381 *et seq.*). Medicaid is financed by state and federal funds, but administered by the states. Although federal law prescribes requirements for each state to receive federal money, a state has considerable discretion in designing the contours of its program.

Medicare, 42 U.S.C. § 1395 *et seq.*, is a nationally uniform program of health insurance for the aged and, since 1973, the disabled. It is completely financed and administered at the federal level by the Social Security Administration and certain insurance carriers called "fiscal intermediaries," who act as the Secretary's agents to pay institutional providers like Patchogue Nursing Center.

The statutory provision at issue herein provides, in pertinent part:

> (1) Where the Secretary determines that a skilled nursing facility which has filed an agreement pursuant to subsection (a) (1) of this section or which has been certified for participation in a plan approved under subchapter XIX of this chapter no longer substantially meets the provisions of § 1395x(j) of this title, and further determines that the facility's deficiencies—
>
> * * * *
>
> (B) *do not immediately jeopardize the health and safety of its patients*, the Secretary may, *in lieu of terminating the agreement or certification of the facility*, provide

that no payment shall be made under this subchapter (and order a State agency established or designated pursuant to § 1396(a)(5) of this title to administer or supervise the administration of the State plan under subchapter XIX of this chapter to deny payment under such subchapter XIX) with respect to any individual admitted to such facility after a date specified by him.

(2) The Secretary shall not make such a decision with respect to a facility until such facility *has had a reasonable opportunity*, following the initial determination that it no longer substantially meets the provisions of § 1395x(j) of this title, *to correct its deficiencies, and*, following this period, *has been given reasonable notice and opportunity for a hearing*.

(3) The Secretary's decision to deny payment may be made effective only *after such notice to the public and to the facility as may be prescribed in regulations*, and *its effectiveness shall terminate (A) when the Secretary finds that the facility is in substantial compliance (or is making good-faith efforts to achieve substantial compliance)* with the provisions of section 1395x(j) of this title, or (B) in the case described in paragraph (1)(B), with the end of the eleventh month following the month such decision is made effective, whichever is made first. If a facility to which clause (B) of the previous sentence applies still fails to substantially meet the provisions of section 1395x(j) of this title, on the date specified in such clause, the Secretary shall terminate such facility's agreement or provide for termination of such facility's certification, notwithstanding the provi-

> sions of paragraph (2) of subsection (b) of this section, effective with the first day of the first month following the month specified in such clause.

42 U.S.C. § 1395 cc(f) (emphasis added).

A party seeking issuance of a preliminary injunction in this circuit has the burden of proving " '(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Bell & Howell: Mamiya Co. v. Masel Supply Corp.*, 719 F.2d 42, 45 (2d Cir. 1983) (quoting *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979) (per curiam)).

The standard for appellate review of the grant or denial of a preliminary injunction is a limited one. A motion for preliminary injunctive relief is directed to the sound discretion of the trial judge; and a decision granting or denying that relief will not be disturbed unless it constitutes an abuse of that discretion. *See, e.g., Bell & Howell, supra*, 719 F.2d at 45.

In denying appellant's motion for a preliminary injunction in the instant case, the district court held that although "substantial harm . . . will result to the plaintiff-[appellant] from the ban . . .," plaintiff-appellant failed to demonstrate a "substantial likelihood of success" on the merits to justify imposition of an injunction. Hearing, January 27, 1986, Joint App. 318. The district court based its decision on the finding

> that considering the negotiations back and forth and the various conferences and exhibits and other things referred to during the course of the testimony, that

> the plaintiff was fully advised of the complaint of the government, they were sufficient to warrant a ban. They constituted a series of detriments to the quality of life of the residents, with respect to dietary matters. Therefore, there is a substantial basis for the decision of the administrative agency. . . .

Id. It should be noted that the district judge heard oral argument on four separate occasions in this case. The district court held a hearing on the preliminary injunction during which he heard the testimony of five witnesses including that of Mr. Maggio, the Administrator of Patchogue, as well as the representatives from both DOH and HHS who visited the facility.

1. *Irreparable Harm*

Patchogue alleged that it would be harmed in two ways if injunctive relief were not granted: (1) Patchogue projected that it would lose $10,300 per month in federal funds and would suffer an additional actual loss of approximately $40,000 in state reimbursements; and (2) Patchogue predicted that its reputation as a quality facility would be destroyed by publication of notice of the ban. After taking the testimony of Patchogue's expert witness regarding potential economic harm and after hearing extensive argument on the likely consequences of and possible alternatives to publication in widely-circulated newspapers, the district court concluded that there is a risk of "*substantial harm* to plaintiff from the ban." *Id.* (emphasis added). This court need not address the question of whether the claim of irreparable harm is meritorious, because Patchogue has failed to sustain its burden of demonstrating either a likelihood of success on the merits or a fair ground for litigation and a balance of hardships tipping in its favor.

2. *Likelihood of Success on the Merits or a Fair Ground for Litigation and a Balance of Harships in its Favor*

a) *Failure to Promulgate Regulations*

The Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, § 916a, 94 Stat. 2623, 2623 (codified at 42 U.S.C. § 1395cc(f)), which empowered the Secretary to discontinue Medicare reimbursement to noncompliant facilities was enacted on December 5, 1980. As of the date of oral argument,[1] the Secretary had failed to promulgate regulations defining either the grounds for the imposition of an intermediate sanction, 42 U.S.C. § 1395cc(f), or the procedures for providing "notice to the public and to the facility." 42 U.S.C. § 1395cc(f)(3).

While this court is troubled generally by such agency inaction since it often frustrates Congressional intent and leaves parties futiley floundering to comply with unknown and unknowable guidelines, this court disagrees with appellant's contention that a ban on reimbursement cannot be imposed in the absence of duly adopted regulations.

We hold that the statute is self-enforcing. In our view Congress chose precatory language in providing that "[t]he Secretary's decision to deny payment may be made

---

1 The Department of Health and Human Services issued regulations entitled "Medicare and Medicaid Programs" and subtitled "Intermediate Sanction for Long-Term Care Facilities." 51 Fed. Reg. 24,484 (July 3, 1986). The promulgation of these regulations does not affect this court's conclusion that appellant failed to sustain its burden on a motion for preliminary injunctive relief. The regulations do not authorize any harsher financial penalties than those appellant sought to have enjoined nor do they entitle appellant to greater procedural safeguards than those afforded to date. The regulations merely formalize the procedures which the Secretary had been following in practice and which this court adjudges to be in accordance with statutory due process requirements and constitutional due process standards.

effective only after such notice to the public and to the facility as *may* be prescribed in regulations." 42 U.S.C. § 1395cc(f)(3) (emphasis added). By choosing the word "may," rather than 'shall,' 'must,' or other mandatory language, Congress allowed the Secretary to exercise discretion in deciding whether regulations were needed to effectuate the statute. The legislative history further supports our statutory construction. *See, e.g.*, H.R. Rep. No. 1167, 96th Cong., 2d Sess. 1, 56, *reprinted in* 1980 U.S. Code Cong. & Admin. News 5526, 5569 ('The Secretary *would be expected* to define by regulation the grounds for the imposition of an intermediate sanction.') (emphasis added).

It should be noted that Congress takes a more compulsory stance in the legislative history regarding "public notification to potentially affected beneficiaries." *Id.* at 57, 1980 U.S. Code Cong. & Ad. News at 5570. The Report states: "[t]he Secretary *would be required* to promulgate regulations setting forth the procedures for implementing this provision." *Id.* (emphasis added). Despite the strength of this language, this court concludes that the failure to issue regulations defining the procedures for notifying beneficiaries does not preclude the use by the agency of section 1395cc(f) sanctions. In light of the precatory language elsewhere in the statute, and of the important policy considerations underlying the intermediate sanction provision, it is unlikely that Congress would forbid the use of the sanction merely because the agency failed to promulgate notification regulations where, as here, the agency clearly gave, and the provider undoubtedly had, *de facto* notice that a ban was impending.

An agency is authorized to carry out its statutory duty even in the absence of specific regulations. See *SEC v.*

Chenery Corp., 332 U.S. 194, 201 (1947) ("It is true that . . . the Commission might have promulgated a general rule dealing with this problem under its statutory rule-making powers . . . [however] we did not mean to imply thereby that the failure of the Commission to anticipate this problem and to promulgate a general rule withdrew all power from that agency to perform its statutory duty in this case."); *Abbott-Northwestern Hospital, Inc. v. Schweiker*, 698 F.2d 336, 342 (8th Cir. 1983) ("There is no question that an agency is authorized to carry out its statutory duty through the adjudication of an individual dispute even in the absence of specific regulations." (citations omitted))

As long as an agency proceeds in accordance with "ascertainable standards," *Holmes v. New York City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968), and provides a statement showing its reasoning when applying the standards, *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971), a court need not require formal rulemaking.

In the instant case, the Secretary has been utilizing an ascertainable standard—the regulations for determining compliance applicable in termination cases—of which Patchogue was made aware through conferences and notification letters. The Secretary has provided the facility with a detailed statement of deficiencies which specifically refers to the applicable state or federal provisions at issue. The Secretary has not acted with unfettered discretion, and thus appellant is incorrect in contending that appellees' actions are invalid because of the lack of duly promulgated regulations.

b) *Compliance With Statutory Due Process Standards*

Section 1395cc(f) provides an outline of the procedures that must be afforded before intermediate sanctions may be imposed. The statute requires: (1) an initial determination by HHS that a skilled nursing facility no longer substantially meets Medicare participation requirements; (2) a reasonable opportunity for the skilled nursing facility to correct the alleged deficiencies; and (3) "following this period, . . . reasonable notice and an opportunity for a hearing." 42 U.S.C. § 1395cc(f).

Appellant contends that (1) the Secretary's initial determination was defective since DOH provided reports to HHS which did not comply with the requirements of 42 C.F.R. § 405.1903 and since the March 8, 1985 resurvey was conducted prior to Patchogue's submission of a Plan of Correction; (2) it was denied a "reasonable opportunity" to correct its deficiencies since the statement of deficiencies issued following the March 8th resurvey failed to indicate whether it supplemented or superseded the statement of deficiencies issued following the January 22nd survey and since the third survey (July 31–August 1) was conducted only nine days after Patchogue learned of the significance of the March 8th statement; (3) it was not afforded a full evidentiary hearing. In essence, appellant argues that it was without notice of its deficiencies and was denied a reasonable opportunity to remedy the problems.

Patchogue received a Statement of Deficiencies for each of the three surveys; interim reports regarding the March and July/August surveys; exit conferences with the surveyors following each survey; two pre-ban informal hearings; and a formal response of May 13, 1985 to

its Plan of Correction. Patchogue also was contacted repeatedly by DOH and HHS administrators both by mail and by telephone and was informed thereby of its rights and of the possible penalties. The record is replete with evidence refuting appellant's contentions that it was without notice of its deficiencies and was denied an opportunity to implement an adequate plan of correction.

Furthermore, appellant is incorrect in asserting that section 1395cc(f) requires a full evidentiary pre-ban hearing. The legislative history of section 916(a) of the Omnibus Reconcillation Act reveals that Congress intended only to afford "the facility. . . an opportunity to present its case at an *informal hearing* consistent with current practices." H.R. Rep. No. 1167, *supra* at 56, 1980 U.S. Code Cong. & Ad News at 5569. This reference to an "informal hearing consistent with current practices" contemplates the type of informal non-evidentiary administrative hearing afforded to facilities before their provider agreements are terminated. Providers are not entitled either under the Act or under constitutional due process standards to a full administrative hearing prior to termination of their provider agreement. *See Case v. Weinberger*, 523 F.2d 602 (2d Cir. 1975); *Sheepshead Nursing Home v. Heckler*, 595 F. Supp. 992 (S.D.N.Y. 1984); *Kings Terrace Nursing Home v. Schweiker*, 82-6470 slip op. (S.D.N.Y. October 25, 1985) (Knapp, J.); *Schwartzberg v. Califano*, 453 F. Supp. 1042 (S.D.N.Y. 1978); *see also Americana Healthcare Corp. v. Schweiker*, 688 F.2d 1072 (7th Cir. 1982), *cert. denied*, 459 U.S. 1202 (1983); *Northlake Community Hospital v. United States*, 654 F.2d 1234 (7th Cir. 1981); *Geriatrics, Inc. v. Harris*, 640 F.2d 262 (10th Cir.) *cert. denied*, 454 U.S. 832 (1981). Accordingly, appellant is not entitled to a pre-ban ad-

ministrative hearing complete with a presiding administrative law judge and an opportunity to cross-examine witnesses when the less severe sanction provided for in 42 U.S.C. § 1395cc(f) is imposed. *See Nassau Nursing Home v. Heckler*, 614 F. Supp. 1091, 1095 (E.D.N.Y. 1985). The Secretary complied with statutory requirements by affording appellant an opportunity to present its Plan of Correction and to seek clarification of the described deficiencies at informal hearings on July 22, 1985 and October 11, 1985.

c) *Compliance With Constitutional Due Process Standards*

Health care providers have a constitutionally protected property interest in continued participation in the Medicare and Medicaid programs, *see, e.g., Case v. Weinberger, supra*, 523 F.2d at 606, and thus are entitled to some form of hearing before being finally deprived of that interest. *Cleveland Board of Education v. Loudermill*, ____ U.S. ____, 105 S. Ct. 1487, 1493 (1985); *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974).

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Supreme Court outlined the criteria by which to evaluate whether the administrative procedures provided are constitutionally sufficient:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that

> the additional or substitute procedural requirement would entail.

Id. at 335. Applying these criteria, the Supreme Court held that an evidentiary hearing prior to the termination of Social Security disability benefits is not required, *id.* at 343, and that the pre-termination administrative review satisfied due process. *Id.* at 343-49.

Initially, it should be noted that although Patchogue did not receive a full evidentiary hearing, it did receive an informal hearing prior to any adverse administrative action. As the Supreme Court has made clear, a pre-deprivation hearing "need not be elaborate . . . and, in general, 'something less' than a full evidentiary hearing is sufficient . . . ." *Loudermill, supra*, 105 S. Ct. at 1495 (quoting *Mathews v. Eldridge, supra*, 424 U.S. at 343). "All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' . . ., to insure that they are given a meaningful opportunity to present their case." *Mathews v. Eldridge, supra*, 424 U.S. at 349 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)). In the instant case, Patchogue was fully capable of communicating its views to the decisionmakers and was accorded numerous opportunities over a period of months to demonstrate either orally or in writing that the ban should not be imposed. Appellant was supplied with detailed statements and was encouraged to contact agency administrators for assistance if necessary.

The process accorded herein is fully adequate and sufficiently protects the private interest—the financial and reputational well-being of the appellant—whose significance cannot be gainsaid. As stated above, there is no

right to a full evidentiary pre-termination hearing although that sanction is more severe, has greater financial impact, and is for an indefinite period of time. *See, e.g., Case v. Weinberger, supra*, 523 F.2d 602. It certainly would be anomalous to impose more stringent procedural requirements where the Secretary has opted to impose a less severe sanction.

Appellant has argued against the applicability of the termination cases to the instant situation. In the termination cases, courts found that due process did not require a full hearing largely because of the immediate danger to the patients. The government interest in immediate action outweighed the financial interest of the nursing home. Appellant argues that ban cases are distinguishable since HHS may opt to impose the intermediate sanction of banning reimbursement only in cases where the facility's deficiencies "do not immediately jeopardize the health and safety of the patients." Thus, appellant contends that since there is no immediate danger to the health of nursing home residents, there is no compelling reason for denying plaintiff a full evidentiary hearing. This court disagrees with appellant's contentions.

The procedures at issue safeguard against mistaken decisions and the concomitant harm they would cause. Under section 1395cc(f), the Secretary may lift the ban if the deficiencies are corrected or if it is determined that the facility is making a good faith effort to achieve substantial compliance. Most importantly, it should be recognized that the interest of the government in protecting the health, safety, and welfare of the residents at Patchogue far outweighs any financial harm which appellant might suffer. While the residents may not be harmed *immediately*, they will be placed in *jeopardy* by extant conditions

at Patchogue. At some point, the rights of the caretaker must end and the rights of the cared-for begin. Patchogue's deficiencies were documented over a long period of time and were of a severe nature. The court must accord substantial weight to the good-faith judgment of those carefully-trained individuals who supervise the skilled nursing facilities and administer the Medicare program.

CONCLUSION

In view of the foregoing, this court finds that the district court's decision was based on the sound exercise of discretion and is supported by findings which are reasonable and which comport with the law. The district court's denial of injunctive relief is hereby affirmed.

APPENDIX E—STAY OF MANDATE PURSUANT TO F. R. A. P. 41(b), DATED AUGUST 26, 1986

United States Court of Appeals
FOR THE SECOND CIRCUIT

PATCHOGUE NURSING CENTER, *Plaintiff-Appellant,* -against- OTIS R. BOWEN, M.D., ETC., ET AL, *Defendants-Appellees.*	Docket Number 86-6036 **NOTICE OF MOTION** for stay pending certiorari application pursuant to FRAP 41(b)

MOTION BY:

RICHARD HAMBURGER, ESQ.
BLOCK & HAMBURGER, ESQS.,
Attorneys for Appellant
202 East Main Street, Smithtown, NY 11787
Tel. (516) 360-0600

Has consent of opposing counsel:		
A. been sought?	☒ Yes	☐ No
B. been obtained?	☐ Yes	☒ No
Has service been effected?	☒ Yes	☐ No
Is oral argument desired?	☐ Yes	☒ No
(Substantive motions only)		
Requested return date:	To be fixed by Court	
(See Second Circuit Rule 27(b))		
Has argument date of appeal been set:		
A. by scheduling order? N/A	☐ Yes	☐ No
B. by firm date of argument notice? N/A	☐ Yes	☐ No

C. If Yes, enter date: _____

OPPOSING COUNSEL:

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Tel. (212) 488-3899

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☒ Yes ☐ No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? N/A ☐ Yes ☐ No
If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☒ No

Judge or agency whose order is being appealed:

Brief statement of the relief requested:
Stay pending *certiorari* to the United States Supreme Court pursuant to FRAP Rule 41(b).

Complete Page 2 of This Form

By:

s/ Richard Hamburger

RICHARD HAMBURGER
Appearing for Plaintiff, PATCHOGUE NURSING CENTER
August 5, 1986

ORDER

IT IS HEREBY ORDERED that the motion be granted on the condition that a bond in the amount of $75,000.00 is posted within five days of the filing of this order.

be and it hereby is granted

s/ Richard J. Cardamone

RICHARD J. CARDAMONE

s/ Lawrence W. Pierce /FXA

LAWRENCE W. PIERCE

s/ Frank X. Altimari

FRANK X. ALTIMARI

8-26-86

Filed
AUG 26 1986
Elaine B. Goldsmith, Clerk
United States Court of Appeals
SECOND CIRCUIT

APPENDIX F—42 U.S.C. §1395cc(f)

(1) Where the Secretary determines that a skilled nursing facility which has filed an agreement pursuant to subsection (a)(1) of this section or which has been certified for participation in a plan approved under subchapter XIX of this chapter no longer substantially meets the provisions of §1395x(j) of this title, and further determines that the facility's deficiencies

> (A) immediately jeopardize the health and safety of its patients, the Secretary shall provide for the termination of the agreement or of the certification of the facility and shall provide, or
> (B) *do not immediately jeopardize the health and safety of its patients*, the Secretary may, in lieu of terminating the agreement or certification of the facility, provide

that no payment shall be made under this subchapter (and order a State agency established or designated pursuant to §1396a(a)(5) of this title to administer or supervise the administration of the State plan under subchapter XIX of this chapter to deny payment under such subchapter XIX) with respect to any individual admitted to such facility after a date specified by him.

(2) The Secretary shall not make such a decision with respect to a facility until such facility *has had a reasonable opportunity*, following the initial determination that it no longer substantially meets the provisions of §1395x(j) of this title, *to correct its deficiencies, and*, following this period, *has been given reasonable notice and opportunity for a hearing.*

(3) The Secretary's decision to deny payment may be made effective only *after such notice to the public and to the facility as may be prescribed in regulations*, and *its effectiveness shall terminate (A) when the Secretary finds that the facility is in*

substantial compliance (or is making good-faith efforts to achieve substantial compliance) with the provisions of section 1395x(j) of this title, or (B) in the case described in paragraph (1)(B), with the end of the eleventh month following the month such decision is made effective, whichever is made first. If any facility to which clause (B) of the previous sentence applies still fails to substantially meet the provisions of section 1395x(j) of this title, on the date specified in such clause, the Secretary shall terminate such facility's agreement or provide for termination of such facility's certification, notwithstanding the provisions of paragraph (2) of subsection (b) of this section, effective with the first day of the first month following the month specified in such clause. (Emphasis added)

Supreme Court, U.S.
FILED
NOV 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-482

IN THE

Supreme Court of the United States

October Term, 1986

PATCHOGUE NURSING CENTER,

Petitioner,

against

OTIS R. BOWEN, M.D., as Secretary of the United States Department of Health and Human Services, and DAVID AXELROD, as Commissioner of the New York State Department of Health,

Respondents.

Brief of the New York State Health Facilities Association, Inc. *Amicus Curiae*, in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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November 4, 1986

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Brief of the New York State Health Facilities Association, Inc., *Amicus Curiae,* in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT OF INTEREST.

This *Amicus Curiae* brief is submitted on behalf of the New York State Health Facilities Association, Inc. ("NYSHFA") in support of the Petition by Patchogue

Nursing Center ("Patchogue") for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit. All of the parties to this litigation have been advised of NYSHFA's intent to file this Brief and all parties have consented to its submission.

NYSHFA is a not-for-profit corporation whose membership consists of over two hundred long term residential health care providers throughout the State of New York. These institutions render "skilled nursing facility" or "intermediate care facility" services as defined in the federal Medicaid Act (42 USC §1396 *et seq.*) to some 30,000 sick and mostly elderly patients. NYSHFA has a significant and substantial interest in the outcome of the instant litigation because of the broad participation of its membership in the Medicare and Medicaid programs and because of its interest in the due process rights of its membership in connection with limitation or severance of participation in the Medicare or Medicaid programs.

For NYSHFA's purposes, this case involves issues arising under the "intermediate sanctions" provisions of 42 USC §§1395cc(f) (Medicare) and 1396a(i) (Medicaid). Under those provisions, the Secretary of the United States Department of Health and Human Services ("HHS") under Medicare and the New York State Department of Health under Medicaid, may impose intermediate sanctions on residential health care facilities when such facilities fail to comply substantially with the standards for provider participation in the Medicaid and Medicare programs.

Intermediate sanctions prohibit Medicare and Medicaid reimbursement to providers for care rendered to any patients admitted after the date of imposition of the sanc-

tions. Under the above referenced statutes, these sanctions are a remedial and not punitive measure, to be used as an alternative to the program decertification of the provider. House Report No. 96-1167; U.S. Code, Congressional and Administrative News, 96th Congress, 2d Session (1980) Vol. 5 at 5569. The less drastic sanction is permitted to be employed where the deficiencies of the facility do not immediately jeopardize the health and safety of the patients. 42 USC §§1395cc(f)(B) and 1396a(i)(1)(B). On the other hand, decertification is the remedy in the event patient health and safety are jeopardized. 42 USC §§1395cc(f)(A) and 1396a(i)(1)(A).

The impact of intermediate sanctions is disproportionately high in New York State. New York is a heavily urban state with several metropolitan areas containing large concentrations of sick, elderly, and poor patients residing in nursing homes. It is not unusual for residents in facilities in the New York City area to be nearly 100% Medicaid. In upstate New York, residential health care facility Medicaid populations in excess of 50% are common. It is for this reason that a ban on payments to such facilities for new Medicare or Medicaid patients is certain to have catastrophic financial consequences.

The statute provides that no decision by HHS to impose an intermediate sanction may be implemented until after the facility is given a reasonable opportunity to correct the deficiencies and, thereafter, reasonable notice of the claimed deficiencies and an opportunity for a hearing. 42 USC §1395cc(f)(2). The statute also provides that the decision to deny payments may be made only after notice to the public and to the facility as may be prescribed in regulations. 42 USC §1395cc(f)(3). Although no implementing regulations had been promulgated at the time

that the informal hearing procedure was afforded to Patchogue, regulations subsequently have been filed that purport to sanction this informal process. 51 Federal Register, 24, 484, July 3, 1986. For reasons set forth below, NYSHFA contends that these regulations, like the process accorded Patchogue, are unconstitutional.

In 1985, the Office of Health Systems Management (OHSM) within the Respondent New York State Department of Health, determined that Patchogue did not meet two of the 18 conditions of participation in the above-referenced programs as set forth in subpart K of title 42 of the Code of Federal Regulations. 42 CFR §405.1101 *et seq.* As set forth in Patchogue's Petition to this Court, the Secretary accepted DOH's recommendation and determined that Patchogue should be banned from future Medicaid and Medicare payments pursuant to 42 USC §1395cc(f)(1)(B). The Secretary subsequently limited the informal pre-deprivation hearing so as not to allow Patchogue full rights to cross-examine and compel the attendance of witnesses, and restricted the hearing to the receipt of written submissions and oral argument by the facility's counsel.

Patchogue sought, *inter alia,* preliminary injunctive relief from the imposition of the ban, claiming that Congress intended a more extensive pre-ban hearing than was provided and that the pre-deprivation hearing was not sufficiently protective of Patchogue's constitutional due process rights. The Circuit Court of Appeals held that considering the due process requirements for the pre-deprivation hearings set forth by this Court in *Cleveland Board of Education v. Loudermill,* ____ US ____, 105 S. Ct. 1487, and *Matthews v. Eldridge,* 424 US 319, 343, the process accorded was "fully adequate and sufficiently

protects the private interest . . . ." See Appendix to Patchogue Petition, p. 45a.

The above referenced implementing regulations were promulgated by HHS shortly before the Court of Appeals decision. They provide for an informal hearing process for the reason that it would be "unreasonably burdensome" to provide a full evidentiary hearing to facilities subjected to intermediate sanctions, and then provide another full evidentiary hearing if the facility does not correct the deficiencies and is terminated. Federal Register, Vol. 51, No. 128, July 3, 1986 at p. 24488.

SUMMARY OF ARGUMENT.

As emphasized in Patchogue's Petition for Certiorari, in all cases decided by this Court where pre-deprivation process was less than that which is required to meet the requirements of due process, sufficient due process procedures were provided at some reasonable time subsequent to the deprivation. See e.g. *Matthews v. Eldridge,* 424 US 319. This court noted in *Cleveland Board of Education v. Loudermill,* ____ US ____, 105 S. Ct. 1487, that the existence of post-termination procedures is directly relevant to the necessary scope of pre-termination procedures. 105 S. Ct. at 1496, n. 12. NYSHFA agrees with Patchogue that non-evidentiary pre-deprivation procedures are constitutionally insufficient to protect the rights* of facilities subjected to intermediate sanctions.

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*Patchogue is entitled to assert rights under the due process clauses of both the Fifth and Fourteenth Amendments to the U.S. Constitution. The right under the Fourteenth Amendment derives from the State's administration of the Medicaid Program.

ARGUMENT.

The Implementation of Intermediate Sanctions After Informal Pre-Deprivation Procedures Constitutes a Violation of Due Process.

Facilities in the position of Patchogue are required by statute to be given an opportunity to correct deficiencies subsequent to a determination of non-compliance. 42 USC §1395cc(f)(2). Because of the drastic financial consequences of a ban on admissions of Medicaid patients, it is very likely that corrective action in most cases will result in the ban being lifted prior to the final termination of Medicare and Medicaid provider status. Indeed, this is the clear intent of intermediate sanctions, and it therefore is to be expected where such sanctions are imposed that the pre-termination informal hearing is the only process which will be received by the facility.

As noted above, in New York State, the Medicaid census in NYSHFA's membership is sufficiently high that the imposition of intermediate sanctions is virtually certain to have catastrophic economic consequences for a facility, unless the sanctions are expeditiously removed. Moreover, it is clear that these financial consequences involve a constitutionally protected property interest in continued participation in the Medicare and Medicaid programs. See e.g., *Case v. Weinberger,* 523 F2d 602 (2d Cir. 1975), see also *Board of Regents v. Roth,* 408 US 564, 577. It also is settled that the flexible concept of due process involves a balancing of interests which considers the private interest at stake; the risk of erroneous harm to such interests through the procedures used (taking into account possible benefits of alternate procedures); and the governmental interests sought to be furthered, including a consideration

of the burdens imposed by the various procedural options. *Mathews v. Eldridge,* 424 US 319, 334-335, *supra.* The result of these considerations, and the minimum that constitutional due process will tolerate, is a hearing for the provider "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 US 545, 552.

The Circuit Court of Appeals reasoned that less than full evidentiary pre-termination hearing procedures is sufficient to meet this due process standard because it would be anomalous to impose more stringent procedural protections for intermediate sanctions than are accorded facilities whose participation in the Medicare or Medicaid programs is terminated. Similarly, HHS argued in support of the regulatory imprimatur on informal non-evidentiary pre-ban hearings that procedural protections need not rise to the same level as employed for provider termination. Federal Register, Vol. 51, No. 128, July 3, 1986, p. 24488.

However, this rationale ignores the fact that, unlike the termination situation, intermediate sanctions are imposed only where patient welfare is not in immediate danger. Therefore, the delay inherent in a full evidentiary hearing is not a practical problem. This rationale also ignores the fact that in the termination situation, a post-termination full evidentiary hearing eventually is provided. As due process procedures subsequent to intermediate sanctions frequently will be rendered unnecessary by corrective action, full due process is not merely delayed, it is effectively eliminated for most impositions of intermediate sanctions.

Thus, the holding by the Court below that there is no need for pre-deprivation recognition of Patchogue's full due process rights presents an issue of great importance to institutional participants in the Medicare and Medicaid

program, both in New York State and throughout the United States.

A right to a hearing "in a meaningful manner" means that there must be a real opportunity to dispute the existence of the deficiencies, whether by impeachment of the factual bases of the deficiencies or a showing that the surveyors were overly subjective, biased or arbitrary. This opportunity may be provided, in conformity with the balancing approach set out above, by requiring at the mandated hearing the appearance by the surveyors, the *prima facie* demonstration of deficiencies and the confrontation and cross-examination of these persons in a manner allowing a provider to demonstrate that the deficiencies do not exist.

The danger to long term providers from the informal procedure employed below is clear. The very existence of a due process and hearing requirement in §1395cc assumes the fallibility of judgments by the survey team. In many cases, in the absence of confrontation or cross-examination of surveyors, that fallibility would not be the subject of meaningful inquiry and review. Thus, the provider in this case has presented the Court with a factual scenario likely to reoccur. There is substantial injury and a possibility, due to the procedure employed, that a sanction will be imposed upon providers erroneously. See *Mathews v. Eldridge, supra.* For this reason an important national issue regarding the administration of the Medicare and Medicaid programs is presented by the instant case.

CONCLUSION.

The Petition for a Writ of Certiorari should be granted. In addition, because of the significance of this case, the

Court should entertain the views of NYSHFA. Accordingly, NYSHFA should be granted *Amicus Curiae* status and be permitted to file any further brief as warranted by the Grant of Certiorari.

Dated: November 4, 1986.

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No. 86-482

In the Supreme Court of the United States

OCTOBER TERM, 1986

PATCHOGUE NURSING CENTER, PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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Petitioner contends that the Due Process Clause requires that a Medicare/Medicaid provider be afforded a full adversarial evidentiary hearing before being temporarily banned from participation in those programs for noncompliance with regulatory standards.

1. a. Petitioner, a nursing home located in New York, has provided services under the Medicare and Medicaid programs since 1977. In January 1985, the New York State Department of Health (DOH)

conducted a compliance survey at petitioner's facilities (see 42 U.S.C. 1395aa). Based on the data obtained in that survey, DOH concluded that petitioner's dietetic services were not in compliance with federal regulations (42 C.F.R. 405.1101-405.1137). DOH notified petitioner of the deficiencies, warning that failure to correct the deficiencies would jeopardize its status as a provider under Medicare and Medicaid (42 U.S.C. 1395cc(b) and (f)). Petitioner was requested to submit a plan to bring itself into compliance with regulatory standards (Pet. App. 32a). In a second survey in March 1985, DOH found that petitioner was still not in compliance. After petitioner was again informed of the deficiencies, it submitted a plan of correction that DOH found unacceptable. Pet. App. 33a.

In June 1985 DOH apprised the Secretary of Health and Human Services of petitioner's noncompliance and recommended that petitioner be sanctioned. Pet. App. 33a. DOH did not recommend that petitioner receive the maximum statutory sanction—termination as a Medicare and Medicaid provider (42 U.S.C. 1395cc(b)). Rather, DOH recommended that the Secretary impose the lesser sanction of temporarily banning petitioner from receiving reimbursement for new Medicare and Medicaid admissions, a ban that would stay in effect until petitioner corrected the deficiencies. See 42 U.S.C. 1395cc(f).[1] The Secretary informed petitioner that

[1] Where, as here, a skilled nursing facility's noncompliance with regulatory requirements does not immediately jeopardize the health and safety of its patients, the Secretary may either terminate the facility's certification or temporarily preclude reimbursement for new patients to the facility until compliance is achieved. 42 U.S.C. 1395cc(f)(1)(B). Where the

it could request an informal hearing, before the imposition of a temporary ban, at which petitioner would have the opportunity to present evidence challenging the finding of noncompliance. Pet. App. 33a; see 42 U.S.C. 1395cc(f)(2).

An informal hearing was held in July 1985. Petitioner asserted that it was adhering to the regulations, accused DOH of incompetence and prejudice, and requested that another survey of its facilities be conducted. Pet. App. 33a. Petitioner's request was granted, and DOH conducted a third survey and found for the third time that petitioner fell short of the regulatory standards. Pet. App. 33a-34a. HHS once again notified petitioner that under the statute it was entitled to an informal hearing before being banned. Another hearing was held at which HHS concluded that petitioner had not complied with federal regulations. As DOH had recommended, the Secretary banned petitioner from receiving reimbursement for new Medicare and Medicaid admissions until it satisfies program requirements. *Ibid.*

b. Petitioner brought this action in the United States District Court for the Eastern District of New York seeking to enjoin the Secretary from banning petitioner from program participation without conducting a full evidentiary hearing. Petitioner argued that a full adversary hearing was required by the statute, or, alternatively, by the Due Process Clause. In denying petitioner's motion for a pre-

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lesser sanction is imposed, termination will become mandatory if the facility fails to achieve compliance within eleven months. 42 U.S.C. 1395cc(f)(3). The statute provides for a full evidentiary hearing after termination. 42 U.S.C. 1395ff(c).

liminary injunction, the district court reasoned that petitioner had not shown a sufficient likelihood of success on the merits (Pet. App. 25a-28a). The court of appeals unanimously affirmed (*id.* at 29a-47a), holding that 42 U.S.C. 1395cc(f)(2) requires only an informal pre-sanction hearing and that such a hearing satisfies the Due Process Clause.

2. The court of appeals' decision affirming the denial of a preliminary injunction is correct. Petitioner does not allege, nor is there, a conflict among the circuits or with any decision of this Court. Further review is unwarranted.

The petition presents only the constitutional issue decided below: whether the Due Process Clause requires a full evidentiary pre-sanction hearing. As the court of appeals noted (Pet. App. 45a), petitioner's position on this issue is inconsistent with this Court's recent statement that, "[i]n general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 545 (1985), quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 343 (1976). Petitioner's contention also disregards the function of the particular sanction in the statutory scheme. Congress empowered the Secretary to implement a temporary ban on reimbursement to noncompliant providers as an alternate remedy short of complete termination. See H.R. Rep. 96-1167, 96th Cong., 2d Sess. 55-58 (1980). An administrative ban is an intermediate sanction that lasts only until the provider cures its deficiencies. 42 U.S.C. 1395cc(f)(3). If the provider fails to measure up to program standards within eleven months after the ban is imposed, the provider is then terminated

(*ibid.*). The statutory scheme thus evidences Congress's intent that the power to ban be used to encourage noncomplying providers to make corrections promptly and thereby avoid termination. See H.R. Rep. 96-1167, *supra*, at 56-57. This goal of encouraging prompt compliance would be thwarted if the formal procedures petitioner urges were required before the Secretary could seek to remedy noncompliance by banning a provider.

In any event, as the court of appeals stated (Pet. App. 45a), petitioner has no basis for challenging the process that it in fact received. Petitioner had the benefit of two informal hearings at which it presented oral and written arguments challenging the DOH surveys. Throughout the administrative stages there was considerable informal communication between petitioner and DOH. And, of course, should petitioner fail to cure its deficiencies and eventually be terminated from the programs, it will then be entitled under 42 U.S.C. 1395ff(c) to a full evidentiary hearing.[2] The court of appeals was correct in concluding (Pet. App. 44a-45a) that the procedures provided under the statute and afforded petitioner in

[2] Other courts of appeals have stated that, in light of the post-sanction evidentiary hearing mandated by 42 U.S.C. 1395ff(c), due process does not require a full evidentiary hearing before a provider is terminated. *Northlake Community Hospital* v. *United States*, 654 F.2d 1234, 1241-1244 (7th Cir. 1981); *Town Court Nursing Center, Inc.* v. *Beal*, 586 F.2d 266, 273-278 (3d Cir. 1978) (en banc); *Case* v. *Weinberger*, 523 F.2d 602, 606-609 (2d Cir. 1975). Since the Constitution does not require a full hearing before the Secretary imposes the more severe sanction of termination, there is no basis for petitioner's contention that a formal evidentiary hearing must precede the intermediate curative step of banning a noncomplying provider until its deficiencies are remedied.

this case satisfy the due process standards set forth by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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Petitioner,

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OTIS R. BOWEN, M.D., as Secretary of the United States Department of Health and Human Services, and DAVID AXELROD, as Commissioner of the New York State Department of Health,

Respondents.

MEMORANDUM IN OPPOSITION FOR RESPONDENT AXELROD

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MEMORANDUM IN OPPOSITION FOR RESPONDENT AXELROD

INTRODUCTION

Petitioner Patchogue Nursing Center ("Patchogue") seeks review of an Order of the United States Court of Appeals for the Second Circuit entered July 22, 1986, which affirmed an order of the United States District Court for the Eastern District of New York, denying Patchogue's motion for a preliminary injunction. Patchogue, a skilled nursing facility, sought to bar respondent Secretary of the United States Department of Health and Human Services ("HHS") from imposing the intermediate sanction of a ban of limited duration on Medicaid and Medicare reimbursement for new admissions pursuant to section 916 of the Omnibus Reconciliation Act of 1980, 42 U.S.C. § 1395cc(f) ("ban" or "intermediate sanction"). This request should be denied because it does not present a special or important reason within Supreme Court Rule 17(1)

for granting a writ of certiorari, and there is no conflict among the United States Circuit Courts of Appeal regarding this issue.

The Process for Imposition of the Intermediate Sanction

The federal statutory and regulatory scheme mandates that a skilled nursing facility be evaluated periodically to ensure that it complies with the eighteen Medicare conditions of participation. 42 U.S.C. § 1395x(j) and 42 C.F.R. Part 405, subpart K.[1] The New York State Department of Health ("DOH") surveys skilled nursing facilities for compliance with the conditions of participation of the Medicare program pursuant to an agreement with HHS. 42 U.S.C. § 1395aa.[2]

The intermediate sanction of a ban on Medicare and Medicaid admissions is imposed by HHS pursuant to 42 U.S.C. § 1395cc(f), "where the [survey reveals] deficiencies [which] are of such character as to substantially limit the provider's or supplier's capacity to render adequate care or which adversely affect the health and safety of residents." 42 C.F.R. § 405.1905. The ban is limited to a period not to exceed eleven months. 42 U.S.C. § 1395cc(f)(3). If the deficiencies are not corrected at the end of the eleven months, the provider agreement is terminated and the facility closed, 42 U.S.C. § 1395cc(f)(3), subject to the facility's right to a full post-termination administrative hearing and to judicial review. 42 U.S.C. § 1395ff(c).

HHS provides the nursing home with a reasonable opportunity to correct its deficiencies and reasonable notice and an opportunity to present its case at an informal hearing before any adverse

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[1] Each of the eighteen Medicare conditions of participation consists of numerous standards which are subdivided into various elements. 42 C.F.R. §§ 405.1101-405.1137.

[2] DOH is also the state survey agency for institutions in which Medicaid recipients received services 42 C.F.R. § 431.115(b) and may certify that facilities meet standards for participation in the Medicaid program. 42 C.F.R. § 442.10.

action is taken against a facility, including the intermediate sanction. 42 U.S.C. § 1395cc(f). The sanction will be lifted when the deficiencies are corrected, or it is determined that the facility is making a good faith effort to achieve substantial compliance with the conditions of Medicare participation. 42 U.S.C. § 1395cc(f)(3).

Statement of the Case

Petitioner is authorized to provide skilled nursing services for up to a total of 120 Medicare (42 U.S.C. § 1395 *et seq.*) and Medicaid (42 U.S.C. § 1396) recipients pursuant to a Medicare provider agreement with HHS.[3]

DOH conducted an annual on-site survey of Patchogue on January 22, 1985 in accordance with 42 U.S.C. § 1395aa to determine whether Patchogue was in compliance with the conditions of participation. The DOH surveyors found Patchogue out of compliance with two Medicare conditions of participation, Governing Body and Management, *see* 42 C.F.R. § 405.1121 and Dietetic Services *see* 42 C.F.R. § 405.1125 (App. 32).[4]

After the survey, DOH held an exit conference to advise Patchogue of the survey findings (App. 32). Thereafter, DOH sent Patchogue a Statement of Deficiencies detailing the areas of non-compliance and the applicable regulatory authority. DOH requested a Plan of Correction from Patchogue, informing Patchogue of the possible sanctions for continued non-compliance. (App. 32).

DOH conducted another survey of Patchogue on March 8, 1985. Thereafter, at the exit conference, the surveyors apprised the operator of their findings of continued non-compliance with the Medicare conditions of participation as well as eleven additional deficiencies relating to the condition of Dietetic Services, *see* 42 C.F.R. § 405.1125(g) (Sanitary Conditions) (App. 33).

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[3] Patchogue was issued its most recent Medicare provider agreement effective December 11, 1984, but has entered into prior agreements since 1977.

[4] References preceded by "App." are to pages of the appendices annexed to the petition.

Patchogue submitted a Plan of Correction on March 18, 1985. DOH formally responded and rejected the plan as unacceptable on May 13, 1985. DOH included a detailed statement explaining why the plan was inadequate and also requested a revised Plan of Correction. (App. 33). DOH representatives contacted the nursing home operator numerous times by phone and by mail to discuss the cited deficiencies and the Plan of Correction and to inform him of his rights and the possible penalties for non-compliance. (App. 43).

DOH advised HHS by letter dated June 6, 1985 that Patchogue was not in compliance with two Medicare conditions of participation and recommended the imposition of the intermediate sanction of a ban on admissions. 42 U.S.C. § 1395cc(f) (App. 33). HHS subsequently notified Patchogue of the possible ban and advised Patchogue that it could request an informal hearing to present evidence contradicting the finding of non-compliance. (App. 33).

An informal hearing was held by HHS on July 22, 1985. Representatives from Patchogue and DOH were present. (App. 33). Patchogue did not present any factual evidence to dispute the accuracy of the survey. Patchogue simply denied it was ever out of compliance and accused DOH of incompetence and prejudice. (App. 33).

Pursuant to Patchogue's request at the hearing, another survey was conducted on July 31 and August 1 by DOH surveyors, DOH officials from Albany and a federal nutrition consultant. (App. 33-34). This survey revealed continued non-compliance with the two conditions of participation. An exit conference was held after the survey and Patchogue was advised of the findings. (App. 34). The federal nutrition consultant concurred with DOH's findings and sent a written report of the results to Patchogue. DOH sent a copy of the survey report and a Statement of Deficiencies to Patchogue. (App. 34).

HHS renewed its notice of intent to impose a ban in September 1985 and offered Patchogue an informal hearing to address the results of the July/August survey. (App. 34). This second hearing

was held on October 11, 1985. (App. 34). Again, Patchogue did not present any factual evidence to dispute the accuracy of the survey. HHS issued its notice to impose a ban on January 2, 1986.[5] (App. 34).

The District Court Decision

Patchogue sought preliminary injunctive relief from the District Court (Weinstein, Ch. J.) on the ground that Patchogue did not receive adequate due process prior to the imposition of the ban. The District Court denied the motion and held that there was no substantial likelihood of success on the merits of petitioner's due process claim. The court found that, considering all of the evidence produced regarding the conferences and negotiations between Patchogue, DOH and HHS, "the plaintiff was fully advised of the complaints of the government". The court also held that the "series of detriments to the quality of life of the residents" were "sufficient to warrant a ban." (App. 27-28).

The Circuit Court Decision

The Circuit Court affirmed the order of the District Court and held that the process accorded petitioner was "fully adequate and sufficiently protects the private interest -- the financial and reputational well-being of the appellant." (App. 45). "Patchogue was fully capable of communicating its views to the decision makers and was accorded numerous opportunities over a period of months to demonstrate either orally or in writing that the ban should not be imposed. [It] was supplied with detailed statements and was encouraged to contact agency administrators for assistance if necessary." *Id.* The court also found that "the procedures at issue safeguard against mistaken decisions and the concomitant harm they would cause."[6] (App. 46).

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[5] Patchogue submitted an acceptable Plan of Correction after the ban was imposed.

[6] The U.S. Circuit Court of Appeals stayed the imposition of the intermediate sanction pending application for certiorari on condition that petitioner post a bond.

ARGUMENT

As will be shown, the petition in this case should be denied because there are no "special" or "important" issues warranting review by this Court and the petitioner has not demonstrated any conflict between the Circuits. Sup. Ct. R. 17.[7] Petitioner argues that the informal hearings provided by HHS prior to imposing a ban on admissions were insufficient to satisfy due process. An examination of the facts leading to the imposition of the ban, however, illustrates the consistent failure of the nursing home to comply with public health standards meant to protect the residents of the nursing home. Petitioners were accorded ample procedural safeguards prior to the imposition of the ban and these safeguards, combined with the informal hearing held by HHS, more than meet minimum due process standards.

This Court has repeatedly held that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).[8] The factors to be considered in determining the adequacy of administrative procedures are set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976):

> [F]irst, the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

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[7] Moreover, a petition for certiorari will not ordinarily be granted until a final judgment has been rendered. *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J. dissenting), *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967). The policy against review of interlocutory orders is important where, as here, a complete development of the facts regarding the procedures afforded would be helpful in assessing the merits of the arguments presented.

[8] Petitioner now claims that it was entitled to a full evidentiary hearing after imposition of the ban. It did not make this argument below, but contended only that it was entitled to such a hearing before imposition of the ban.

> procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Applying these factors, it is apparent that the private interest of the home in avoiding the imposition of a ban, is of limited weight. The Medicaid and Medicare statutes and regulations were not intended "to provide financial assistance to providers of care for their own benefit." *Green v. Cashman*, 605 F.2d 945, 946 (6th Cir. 1979). Rather, the Medicaid and Medicare acts are designed to aid eligible patients. *Id.* at 946. As the Second Circuit wrote in *Case v. Weinberger:*

> A nursing facility's 'need' for patients has nothing to do with the statutory benefits structure...[T]hat a particular nursing facility cannot survive without Medicaid participation was certainly not Congress' foremost consideration in its creation of the Medicaid program.

523 F.2d 602, 607 (2d Cir. 1975).

Moreover, Patchogue can, itself, limit the duration of the ban or avoid it entirely by taking prompt corrective action. The Second Circuit emphasized that Patchogue was given repeated notice of its deficiencies and ample opportunity to correct them. The court wrote:

> The record is replete with evidence refuting appellant's contentions that it was without notice of its deficiencies and was denied an opportunity to implement an adequate plan of correction.

(App.43).

Furthermore, this case does not involve the permanent closure of a nursing home, but only a ban of limited duration which will be rescinded as soon as the nursing home corrects (or even makes a good faith effort to correct) its deficiencies pursuant to the Plan of Correction which has already been proposed by the home and approved by DOH.

Applying the second factor, the procedures followed prior to imposing a ban make it extremely unlikely that a ban will be erroneously imposed. Both HHS and DOH surveyors conducted inspections of the nursing home. Their findings showed that Patchogue failed to meet minimum standards regarding two conditions of participation in the Medicaid and Medicare programs: "Governing Body and Management," 42 C.F.R. § 405.1121 and "Dietetic Services," 42 C.F.R. § 405.1125. These deficiencies were documented in three separate surveys over a six month period and consistently demonstrated that Patchogue lacked the capacity to render adequate care to the patients residing there

DOH fully delineated each of the home's deficiencies at exit conferences and in detailed correspondence. The nursing home responded only by making unsubstantiated allegations regarding the surveyors' judgments. Not once during its exit conferences, its correspondence with DOH or at the informal hearings held by HHS, did Patchogue provide any factual basis or any documentary evidence to refute the surveyors' findings.[9]

In *Town Court Nursing Center, Inc. v. Beal*, 586 F.2d 266, 277 (3d Cir. 1978), the Third Circuit described the survey process and its accuracy in evaluating the care at nursing facilities.[10] The Court wrote:

> It is based in most cases upon routine, standard, unbiased reports by health care professionals. Those professionals evaluated the provider in light of well-defined criteria that were developed in the administrative rule making process. Written submissions are adequate to allow the provider to present his case. Given the

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[9] Because petitioner failed to make any factual assertions disputing the substantial accuracy of the surveys, it did not demonstrate the need for the full evidentiary hearing it claims is envisioned by *Cleveland Board of Education v. Loudermill*, __ U.S. __ 105 S. Ct. 1985; see *Codd v. Velger*, 429 U.S. 624, 628 (1977).

[10] *Town Court Nursing Center* is a case involving the termination of a provider agreement. However, the same process is accorded to a nursing home by DOH prior to any recommendation to impose the intermediate sanction of a ban.

> extensive documentation that the provider is able to submit in response to the findings of the survey teams, the provider is unlikely to need an evidentiary hearing to present his position more effectively.

Thus, given the effectiveness of the survey process in general and considering the facts in this case, it is extremely unlikely that the ban was erroneously imposed.

Applying the third factor, the Government has an obvious and substantial interest in protecting the residents at Patchogue. A full evidentiary hearing, where DOH surveyors could be extensively cross-examined regarding their judgments and the factual basis for each of their determinations, would be extremely time consuming and burdensome. As the Second Circuit wrote:

> Most importantly, it should be recognized that the interest of the government in protecting the health, safety, and welfare of the residents at Patchogue far outweighs any financial harm which appellant might suffer. While the residents may not be harmed *immediately*, they will be placed in *jeopardy* by extant conditions at Patchogue. At some point, the rights of the caretaker must end and the rights of the cared-for begin.

(App. 46-47).

Considering all the factors set forth in *Mathews v. Eldridge*, it is apparent that the Government's interests far outweigh those of the nursing home, that the procedural safeguards gave the home adequate protection and that the ban was properly imposed. Under these circumstances, there is no "special" or "important" reason for this Court to grant the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 28, 1986

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